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COMMENTS

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Arbitration Alternatives with a Russian Party

Among emerging markets in 1996 Russia was rated the riskiest country for foreign investment and was among the countries of the former Soviet Union that were considered to be the greatest credit risk.¹ While the economic outlook for Russia has improved,² the current state of Russian society and economy continues to provide a deterrent to potential investors interested in breaking into the Russian market, as well as to current investors that may be considering expanding their

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1. Results for the third quarter of 1996 placed Russia at the top of country risk ratings and listed the former Soviet Union as the largest credit risk, based on economic and political factors; see *THE ECONOMIST*, Sept. 7, 1996, at 100. Countries considered less risky than Russia include Mexico, Turkey, China, India, Indonesia, Thailand, Poland, Czech Republic, and Chile. See *id.* In 1998 the People's Republic of China remains preferable to Russia for foreign investment. See Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900, 913.

2. See John Thornhill, *Russian Bulls Thunder Ahead*, *FIN. TIMES*, Oct. 8, 1997. "Russia stands at the start of an economic upswing. . . ." *Id.* at 34 (stating that the Russian economy is turning, interest rates have drastically fallen, and industrial production grew 3% in August); Clifford German, *Looking for the Gold Fields of Eastern Europe*, *THE INDEP.*, Oct. 11, 1997, at 4 ("Inflation is coming down, public sector deficits are coming under control and output is recovering.").

involvement in Russia.³ The current state of Russia's legal environment is an integral part of that deterrence, including concerns about the availability of impartial arbitration of disputes.⁴ However, there have been some recent changes in the organization of Russian courts and in Russian rules governing international arbitration that have brought some improvements in the Russian legal climate.⁵

This comment provides guidance for parties to a Russian contract in deciding what forum to choose when drafting an arbitration clause for submitting their dispute to arbitration. This comment first examines the new system of Russian Arbitrazh Courts as an alternate forum for the resolution of international business disputes. The comment then focuses on three main international arbitration fora, namely the International Commercial Arbitration Court in the Russian Chamber of Commerce and Industry, the Stockholm Chamber of Commerce Arbitration Institute, and the International Chamber of Commerce Court of International Arbitration (Paris).

I. Problems Facing the Russian Legal System

Before discussing aspects of international arbitration in context, it is necessary to understand the types of problems facing the Russian legal system in general. As Ilya Nikiforov notes in *Legal Research in Russian Law*, "[w]hen talking about [sic] Russian legal system it is necessary to describe not only the theory, but also actual enforcement of existing laws. Otherwise, the idealized description

3. See John Thornhill, *Playing the Waiting Game*, FIN. TIMES, Oct. 9, 1997, at 8 (stating that political uncertainties are still the greatest deterrent for foreign investors; three big obstacles to operating in Russia remain: tax, bureaucracy, and crime and corruption); *Russia-US Investment Environment*, Russia Express-Perestroika: Executive Briefing, April 24, 1995 available in 1995 WL 7947489; John Barton & Simone Shaheen, *Sharing the Wealth: The Role for Venture Capitalists in Russia's Economic Development*, 27 LAW & POL'Y INT'L BUS. 33, 33 (1995); John Thornhill, *Flexibility Urged on Energy*, FIN. TIMES, Nov. 19, 1994, available in 1994 WL 12631446 (stating that development projects with foreign companies will not be realized unless the investment climate becomes more predictable and stable); John Thornhill, *Investors Look for Russian Climate Change: Prospects for Cutting Through the Bureaucracy*, FIN. TIMES, Nov. 24, 1994, at 2 [hereinafter Thornhill, *Investors Look*].

4. Using courts remains difficult for settling disputes in a civilized way. See Paul E. Tatum & Kira Nicole Todd, *Don't Get Caught in a Contract Dispute in Russia*, ASIAN WALL ST. J., Oct. 7, 1996, at 12. Some international companies involved in energy projects in the past postponed their projects (worth billions of dollars for Russia's oil field development) in Russia waiting to see the final version of production-sharing legislation, particularly provisions providing for impartial arbitration of disputes. See Robert Corzine, *Sakhalin I Oil Project to Begin*, FIN. TIMES, June 11, 1996, at 3. One of many deterrents to foreign investors is that "the legislative climate can change overnight with little possibility of international arbitration." Thornhill, *Investors Look*, *supra* note 3, at 2.

5. See Alan J. Koman, *Arbitrating Among the Russians? Sixteen Issues a Western Party Must Consider Before Entering into Arbitration Proceedings*, 42 FED. LAW. 26, 33 (1995); Steven Keeva, *Ceeli Honors Slovak Leader, Michal Kovac Thanks U.S. Lawyers for Aiding His Country*, 81 A.B.A. J. 109, 109 (1995) (quoting Steven Walther, chair of the ABA Standing Committee on World Order Under Law, on the positive role of the Arbitration Courts).

may mislead [people]."⁶ He then provides a short summary of the problems facing the Russian legal system: often rules emerge as a result of economic necessity rather than law; lack of tradition of law-making; political instability; corruption and bribery; people's unwillingness to use the law; and lack of state bodies' adherence to the law.⁷ Nikiforov suggests that a possible answer to these problems involves more lawyers and more reliance upon the law.⁸ Another commentator's suggestion for foreign businessmen dealing with Russian partners is to "demand arbitration clauses in your contracts and find a very good lawyer."⁹ Specific problems having an impact on arbitration are discussed below.

II. The Russian Arbitrazh Courts

In the past, arbitration (in the nonjudicial sense) among parties to a Russian contract was the standard method for resolution of economic disputes in foreign trade, and the traditional forum for such arbitration was the International Commercial Arbitration Court (ICAC) under the Russian Federation Chamber of Commerce and Industry (CCI).¹⁰ However, in response to economic, legislative, and constitutional reforms in the early 1990s, in 1995 Russia enacted new laws fundamentally revising and superseding analogous statutes passed in 1991 and 1992, creating the Arbitrazh (Arbitration) Courts.¹¹ These courts are specially designed to deal with economic disputes, and are separate from the Constitutional Courts and Courts of General Jurisdiction (civil courts).¹² Despite their name, they are state judicial bodies and their purpose is to "adjudicate, not arbitrate, economic disputes between [businesses]."¹³

Some of the changes made include a three-tier structure replacing a two-tier structure, an appellate process for judicial acts, statutory structure and powers

6. Ilya Nikiforov, Legal Research In Russian Law, Russian Legal Server—Tutorial on Russian Legal Research (visited Oct. 20, 1997) <<http://solar.rtd.utk.edu/~sanor/research/tutorial.html>>, at page 2. See also Simon G. Zinger, Comment, *Navigating the Russian Shipping Industry: Making the Most of the International and Russian Law for Successful Arbitration Against Russian Parties*, 8 U.S.F. MAR. L.J. 141, 175 (1995) (stating that legal procedures do not resemble the procedures described by Russian legislation or international conventions).

7. Nikiforov, *supra* note 6, at 2.

8. *Id.* at 3.

9. Kira Nicole Todd & Paul E. Tatum, *Best Be Wary of Joint Ventures in Russia*, WALL ST. J. EUR., Aug. 25, 1995, at 6.

10. See Zinger, *supra* note 6, at 159.

11. Law on Arbitrazh Courts, *Sobr. Zakonod. RF*, 1995, No. 1-FKZ; Arbitrazh Procedural Code, *Sobr. Zakonod. RF*, 1995 No. 70-FZ. See also *Russia Overhauls System of Arbitration Courts*, 6 WORLD ARB. & MEDIATION REP. 173, 174 (1995) [hereinafter *Russia Overhauls System*]; Glenn P. Hendrix, *Business Litigation and Arbitration in Russia*, 31 INT'L LAW. 1075 (1997); *Arbitrazh Law, Commentary and Consultation*, *ZAKONOD. I EKON.*, No. 19-20 (113-114)/95, at 54 [Hereinafter *Commentary*].

12. See *Russia Overhauls System*, *supra* note 11, at 174.

13. *Id.* To avoid confusion, these courts will be referred to as the Russian Arbitrazh Courts, rather than arbitration courts.

for each Arbitrazh Court, and a more detailed procedural code.¹⁴ The Arbitrazh Courts consist of: (1) The High Arbitrazh Court; (2) Federal Arbitrazh Courts; and (3) Arbitrazh Courts of the republics, territories, regions, Federal-importance cities, autonomous regions, and autonomous areas (referred to as arbitrazh courts of the subjects of the RF).¹⁵ Personal jurisdiction in the Arbitrazh Courts is obtained through actions taken by entrepreneurs, companies, and other legal entities and public authorities, while subject matter jurisdiction generally covers disputes arising out of economic contracts or property relationships.¹⁶ Parties (including foreigners) to a dispute may refer the matter to private arbitration.¹⁷

A. POSITIVE ASPECTS OF THE ARBITRAZH COURTS

One commentator has said that the Arbitrazh Court "is one of the most important institutions in Russia's transformation from a command economy to a market economy . . . [stating that] [n]ow, foreign investors can have confidence that commercial disputes can be arbitrated fairly."¹⁸ One source of such optimism may be the laws creating (and later amending) the Arbitrazh Courts. The Arbitrazh Procedural Code (the Procedural Code) governs the Arbitrazh Courts' procedural methods and provides mechanisms to help ensure the fair adjudication of disputes.¹⁹ The Procedural Code also contains articles that, on their face, provide for the speedy resolution of a dispute and adequate measures for achieving interim relief and for securing a claim.²⁰

1. *Impartiality*

Impartiality is emphasized in article 5 of the Procedural Code when it states that the Arbitrazh Courts and their judges are independent and shall be subject to the law alone.²¹ Furthermore, any attempt by organizations or officials to intervene in the activity of the Arbitrazh Courts and their judges carries with it statutory liability.²² Articles 6 and 8 of the Procedural Code ensure that the parties

14. See *Commentary*, *supra* note 11, at 54.

15. See Law on Arbitrazh Courts, art. 3.

16. See *Russia Overhauls System*, *supra* note 11, at 174. For a list of the international treaties and agreements in which the Arbitrazh Courts take part, see Letter of the Higher Arbitrazh Court of the Russian Federation No. OM-230 of August 16, 1995.

17. "Russian law permits private parties to have their economic disputes resolved through ADR, including private arbitration. If the . . . court establishes that the parties intended to have their dispute 'arbitrated,' it stays its proceeding and refers the parties to (genuine) arbitration." *Russia Overhauls System*, *supra* note 11, at 174. See Arbitrazh Procedural Code, art. 23.

18. Keava, *supra* note 5, at 109.

19. See generally Arbitrazh Procedural Code.

20. *Id.*

21. *Id.* art. 5.

22. *Id.*

are to be treated equally before the law,²³ and persons that do not speak the language of the proceedings (Russian) are "ensured the right to get fully acquainted with the case materials and to take part in the judicial actions through an interpreter, and also the right to use their native tongue in the arbitrazh court."²⁴ Judges may be disqualified when there is a conflict of interest.²⁵ The same is true for procurators, experts, and interpreters.²⁶ Judges are also prohibited from participating in more than one hearing.²⁷ Assuming that the laws are heeded in practice, these provisions appear adequate to protect the parties from unfair treatment.²⁸

2. *Duration of Dispute Resolution*

Speedy resolution of disputes is often a reason that parties to an international agreement prefer arbitration over the use of national courts.²⁹ Arbitration (in the alternative dispute resolution (ADR) sense) typically takes months, while many litigation systems may take years.³⁰ However, the Procedural Code stipulates that settlement of disputes must not exceed two months from the filing of a claim

23. Article 6 states:

The legal proceedings . . . shall be conducted on the principles of equality before the law and before the court of organizations—regardless of their place of location, their subordination and form of ownership, and of the citizens—regardless of their sex, race and nationality, their language and origin, their property and their official position, the place of residence, the attitude towards religion, the convictions and the affiliation with public associations, and also of the other circumstances.

Id. art. 6.

24. *Id.* art. 8.

25. Article 16 provides that a judge may not take part in the case: (1) if he is a relative of the persons taking part in the case, or of their representatives; (2) if he has taken part in the previous examination of the given case in the capacity of an expert, interpreter, prosecutor, representative, or witness; (3) if he is personally interested, directly or indirectly, in the outcome of the case or if there are other circumstances calling into question his impartiality. *Id.* art. 16. Articles 19-21 place an obligation on judges, experts, and interpreters to disqualify themselves based on the grounds mentioned in articles 16 and 17, and lay out the procedures for the challenge to a judge, expert, or interpreter. *Id.* arts. 19-21.

26. Experts can be excluded on the same grounds as judges, and in addition on the following grounds:

1. [where] his official or any other kind of dependence . . . on the persons participating in the case, or the representatives of these persons; 2. [where expert conducted audit], the materials of which have served as the ground or as the reason for turning to the arbitration court, or are used in the investigation of the case.

Id. art. 17.

27. *Id.* art. 18.

28. Though the laws may appear adequate, actual practice may prove otherwise. See Nikiforov, *supra* note 6; Zinger, *supra* note 6 at 181.

29. See William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 43 (1996); Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 948.

30. See Fischer & Haydock, *supra* note 29, at 954.

in the Arbitrazh Court.³¹ The court proceedings are not to be interrupted except for periods of recess.³² In "exceptional cases, the court may recess from a period not to exceed more than 3 days."³³ On certain grounds, a court may suspend a proceeding.³⁴ The Arbitrazh Court will then resume the proceedings and examine the case anew.³⁵

If adhered to, such expedient judicial processing presents the Arbitrazh Courts as an attractive forum for those seeking prompt resolution of their dispute. However, one down-side to this aspect is that such expedient measures may not allow the Arbitrazh Courts to adequately address larger, more complex disputes.³⁶

3. *Cost of Arbitrazh and Expenses*

Cost saving is another advantage often mentioned when talking about arbitration as opposed to litigation in national courts.³⁷ Tom Arnold, in an article discussing the hidden traps of arbitration, notes that if one cuts the time involved in an arbitration proceeding, one will likely save 40 percent of the costs.³⁸ Thus, the above-mentioned provision for the two-month requirement for dispute settlement could potentially represent a substantial savings to parties who choose the Arbitrazh Courts (judicial ones) over other ADR methods that may take longer periods of time (depending on the circumstances).

It is also necessary to survey the court costs in the Russian Arbitrazh Courts, keeping in mind the current exchange rate of rubles to dollars.³⁹ Arbitrazh costs consist of a state duty and expenses involved in the examination of the case.⁴⁰ State duties are levied on: (1) statements of claim; (2) bankruptcy actions; (3) applications to enter the case as a third party; (4) applications for establishing facts of legal importance; (5) appeals; (6) petitions for injunctions; and (7) appeals

31. "The case shall be examined and the decision adopted on it within a term, not exceeding two months from the date, on which the statement of claim was filed with the arbitration court." Arbitrazh Procedural Code, art. 114.

32. *Id.* art. 117(3).

33. *Id.*

34. Article 120 states:

The arbitration court shall have the right to postpone the examination of the case, if it cannot be examined at the given session, including as a consequence of some of the persons, participating in the case, the witnesses, the experts or the interpreters failing to attend, or if additional [evidence] shall be presented.

Id. art. 120(1).

35. *Id.* art. 120(3).

36. See Hendrix, *supra* note 11, at 28.

37. See Slate, *supra* note 29, at 43; Fischer & Haydock, *supra* note 29, at 954.

38. Tom Arnold, *Delay and Cost Booby Traps in Arbitration Practice and How to Avoid Them*, CA 13 A.L.I.-A.B.A. 99, 105.

39. As of Oct. 3, 1996, the ruble rate was 5,503 rubles per dollar. See *Central Bank of Russia Exchange Rates from 28th November*, Russia Express Briefing, Dec. 9, 1996, available in 1996 WL 8619149. The new corridor, set every six months, was set from 5,500 to 6,350. See *Moscow Sets Corridor for Rouble for Full Year as Its Confidence Grows*, Russia Express Briefing, Dec. 9, 1996, available in 1996 WL 8619148 [hereinafter *Moscow Sets Corridor*].

40. See Arbitrazh Procedural Code, art. 89.

and cassation complaints against rulings of the court on writs of execution and refusal to issue writs of execution.⁴¹ Duties are based on the "price of the claim," which is determined from the claimed amount in actions for money damages, actions challenging writ of execution, or other writ.⁴² A sliding scale from 5 percent to .05 percent, depending on the value of the claim, is generally used, with a maximum state duty of approximately \$14,000.⁴³

Thus, the cost of resolving a dispute in the Arbitrazh Courts may be substantial, especially if a claim involves a property dispute, as properties, in Moscow for example, are some of the most expensive in Europe.⁴⁴ In any case, the maximum duty limits Arbitrazh costs.

Court expenses are borne by the unsuccessful party, but failure of a party to comply with the procedural rules entitles the court to impose court expenses on the party in violation, regardless of the outcome of the case.⁴⁵

Part of the court costs/expenses are experts, witnesses, and interpreters that are to receive compensation for expenses incurred in travel and accommodation, and are to be paid a daily allowance.⁴⁶ Experts and interpreters are also to be paid compensation for their work.⁴⁷ Workers and other employees summoned to appear as witnesses are also to receive compensation for their time away from work.⁴⁸ Alternatively, the Procedural Code allows for the parties to agree on apportionment of Arbitrazh costs.⁴⁹

For complex disputes involving many witnesses and experts, and likely interpreters in international disputes, these costs could be substantial.⁵⁰ In less complicated disputes, these costs are not likely to be excessive in comparison with the same costs in other arbitration fora.⁵¹

41. See *id.* art. 91.

42. *Id.* art. 92.

43. See *id.*; Hendrix, *supra* note 11, at 25.

44. See Aline Sullivan, *Real Estate for the Truly Courageous*, INT'L HERALD TRIB., Jan. 6, 1996, at 15; John Thornhill, *Survey of European Business Property: Undeveloped Land Is Expensive—Markets in Eastern Europe/Moscow*, FIN. TIMES, Mar. 8, 1996, at 36. See also Mike Trickey, *Moscow's Dazzling New Face Masks Mayhem and Despair*, OTTAWA CITIZEN, July 31, 1996; *Western European Cities Become Cheaper*, Survey, AGENCE FRANCE—PRESSE, June 13, 1996; Holger Jensen, *Quality of Life in New Russia Is Expensive and Dangerous*, ROCKY MTN. NEWS, June 20, 1996, at 3A.

45. See Arbitrazh Procedural Code, art. 95(3).

46. See *id.* art. 94.

47. See *id.*

48. See *id.*

49. *Id.* art. 95.

50. In discussing similar costs involved in arbitration proceedings, Fischer and Haydock note that "defending a case venued in another country may cause a party to pay substantial travel and lodging expenses and incur unnecessary attorney's fees by having to hire additional attorneys in other countries." Fischer & Haydock, *supra* note 29, at 958.

51. Incidental costs for interpreters, experts, and witnesses may be one of the most expensive costs for the parties. See *id.* For foreign persons, this will be particularly so due to the cost of hotels and restaurants of international standard in Moscow. See *Western European Cities Become Cheaper*, *supra* note 44; Jensen, *supra* note 44, at 3A. If the court is located outside of Moscow or St.

4. *Interim Relief*

Interim relief and measures for securing a claim are provided for in articles 75 and 76 of the Procedural Code:

[The following may be measures for securing claim]:

- 1) the arrest of the property or of [moneys] belonging to the defendant;
- 2) [injunction against] defendant to perform certain actions;
- 3) [injunction against] other persons to perform certain actions . . . ;
- 4) the suspension of the exaction by the writ of execution or by the other document disputed by the plaintiff in conformity with which the exaction shall be effected in the indisputable (nonacceptance) order; the suspension of the sale of the property in case of filing a claim for its release from under the arrest.⁵²

In most (nonjudicial) arbitration fora these types of measures are not available. Thus availability of interim relief in the Arbitrazh Courts is advantageous when such measures are necessary.

5. *Enforcement*

Another advantage of the Arbitrazh Courts is that a successful party will enjoy immediate enforcement of a court judgment without having to apply to a Russian court to enforce a foreign (arbitral or judicial) judgment.⁵³ However, actually enforcing a judgment in Russia's court system can be very difficult and time consuming.⁵⁴ One commentator comments that businessmen that decide to have their legal problems resolved in the Arbitrazh Courts should be prepared for a lengthy process (several months or years), as well as substantial expenses.⁵⁵ In

Petersburg, and involves mostly the participation of Russian nationals from the same area as the court, then costs may be much less. *See Trade and Investment in Yuzhno-Sakhalinsk*, Russia Express Briefing, June 24, 1996, available in 1996 WL 8618803 (stating that average Russian wages are US\$2,600 per year); Sullivan, *supra* note 44. *See generally* Executive Briefing, *Hotels of CIS: Where, How Much and What For?*, Russia Express-Perestroika, Dec. 5, 1994, available in 1994 WL 3224222 (demonstrating that hotels outside Moscow are less).

52. Arbitrazh Procedural Code, arts. 75, 76.

53. *See* Zinger, *supra* note 6, at 160-61. A victorious party must apply for leave for execution before the Arbitrazh Court in which the judgment was made. *See Russia Overhauls System*, *supra* note 11, at 173-74. The Arbitrazh Court then issues a writ of execution and the prevailing party forwards the writ to the bank in which the losing party maintains an account or submits it to the bailiff for execution. *See id.* When the writ is served, the bank is under a legal duty to satisfy the judgment by debiting the account. *See id.* For local award enforcement of a foreign award, a practitioner is required to present a legalized original of the award to a local court, which may challenge the award. *See* Zinger, *supra* note 6, at 160. "Thus, the practitioner whose instinctual desire is to arbitrate at home and seek award enforcement in Russia, risks the danger that local courts will not understand the complexities of his demands . . . [A] practitioner who sacrifices home advantage and has his case heard before a Russian tribunal will have automatic enforcement of the award. . . ." *Id.*

54. *See* Hendrix, *supra* note 11, at 34 (describing enforcement as the courts' "achilles heel"); Roberto G. MacLean, Lecture titled *Judicial Reform in the Americas*, given at Southern Methodist University (Nov. 8, 1996). MacLean comments that once you receive an award you are not even half-way finished. Obtaining actual enforcement in Russia can be very difficult. Part of the problem is the ineffectiveness of court bailiffs and general lack of respect for the judicial system. *Id.*

55. V. Bublik, *Ispolnenie Arbitrazhnikh Reshenii: Zakonodatelstvo i Praktika Evo Primeneniya*, 4 Khoziaistvo i Pravo 100, 1995.

addition, he adds that the victor in an arbitral process should not be too quick to celebrate because the enforcement of the Arbitrazh (judicial) award is a separate problem to which one will not be able to find a final solution (this being the reason they spent the time, effort, and money to arbitrate in the first place).⁵⁶

So, although theoretically there is immediate enforcement of an award, the reality is that it may not be any easier than trying to enforce a foreign judicial or arbitral award.⁵⁷ It should be noted, however, that the Russian legislature is considering a bill that would improve the bailiff system for enforcement of awards.⁵⁸

6. *Appellate Review*

Appellate review is available in the Russian Arbitrazh Courts.⁵⁹ The appellate process in many countries may be a reason to avoid the judicial courts and opt for arbitration in order to save time and legal costs.⁶⁰ The Procedural Code, however, generally provides that the appellate court must decide a case within one month from the day it is received.⁶¹ Thus, again, the Russian Arbitrazh Courts may not represent as much a time delay (and consequently cost) as comparable Western court systems or arbitral fora.⁶²

Taken together, the above aspects of the Arbitrazh Courts make it a sensible choice in terms of impartiality, time and effectiveness, and possibly cost. However, as mentioned above, the idealized written law may depart from actual practice.⁶³ What is done in practice in light of Russia's economic and social setting may differ greatly.

B. CONCERNS ABOUT THE ARBITRAZH COURTS

1. *Lack of Experience*

Inexperience in dealing with international commercial transactions is often cited as one reason parties may wish to avoid the Arbitrazh Courts, despite their latest statutory developments.⁶⁴ The Arbitrazh Courts "have yet to establish their

56. *Id.*

57. Whether a foreign arbitral award or judgment or a Russian judgment, once a Russian court issues an order, the problem of enforcement through a bailiff still remains. *Id.* One of the problems with the procedure is that the enforcers are "poorly paid bailiffs from local commercial courts; some are easily tempted into delaying or ignoring settlements." Tatum & Todd, *supra* note 4, at 12.

58. See Hendrix, *supra* note 11, at 35.

59. See Arbitrazh Procedural Code, art. 145.

60. See Fischer & Haydock, *supra* note 29.

61. Arbitrazh Procedural Code, arts. 156, 173.

62. *But see* Bublik, *supra* note 55.

63. See Nikiforov, *supra* note 6, at 2; Zinger, *supra* note 6.

64. See Zinger, *supra* note 6, at 160. "[E]nforcing business contracts between private parties remains quite uncertain, in part because of the lack of commercial legislation and judicial experience in interpreting and enforcing private agreements." Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects for Establishing a Civil Economy in Russia*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 65, 82 (1995).

credibility and thus provide little comfort for foreign investors at this time."⁶⁵ Thus, while inexperience may be a concern, it is a concern that may dissipate over time.⁶⁶ But certainly while Russia's economy is in a state of transition, problems of interpreting international commercial contracts will remain.⁶⁷

2. *Impartiality*

Impartiality, despite the new laws, is still a large problem, due to the potential for corruption and bribery, which remain very pervasive in Russia and are unlikely to improve in the near future.⁶⁸ Simon G. Zinger, in discussing the Russian legal system, makes several observations about the effect of corruption on the legal system in Russia.⁶⁹ He notes that "bureaucrats and officials at every level of government have discovered that the new Russia offers much to gain from hidden criminal acts."⁷⁰ He further explains: "[C]ourts and judges, which once took their orders directly from Communist Party officials, have been left with little sense of jurisprudence or notion of right and wrong. Underfunded and inefficient, the courts are tempting targets for gangsters who are able to pay for 'justice' on their own terms. . . ."⁷¹ Zinger also quotes Russia's Interior Minister as stating that the amount of money to be gained from corruption "is undermining political incentive to construct a legal system able to fight crime and build democracy. As a result of such competition, 'a foreign party . . . may discover the procedures . . . [of] Russia's legal and administrative offices will not resemble the procedures described by Russian legislation or international conventions.'"⁷²

Glenn Hendrix, in his review of the Arbitrazh Courts, states that the concerns of impartiality due to corruption may not be as pervasive as some might suspect.⁷³

65. Barton & Shaheen, *supra* note 3, at 57.

66. See Koman, *supra* note 5, at 31 (stating that this Arbitration Act is beginning to change the misapplication of foreign law, but only time will tell if the new law will open up arbitration so far as proof of foreign law is concerned).

67. "[F]oreign parties should remember that although the Arbitrazh courts possess the authority to adjudicate commercial disputes, it remains uncertain whether the Arbitrazh courts can function in Russia's free market economy." Zinger, *supra* note 6, at 166. By way of example, Mikhail Yukov, the first vice-president of the Supreme Court of Arbitration, is quoted as saying,

[s]hares and securities—these issues are too complicated for us. [W]e don't understand them and we have no laws to deal with it. . . . Our judges never dealt with disputes on money, shares or bankruptcies. We can't help foreign investors when we have no rules for the game. We can't protect them from fraud.

Id. at 172-73 (quoting an interview published in Elif Kaban, *Russian Courts Have Guns, but No Share Laws*, REUTERS MONEY REP., Apr. 5, 1995).

68. The severe extent of corruption in Russia's courts was noted by the Russian Interior Ministry. *Id.* at 175.

69. *Id.*

70. *Id.* at 174.

71. *Id.* at 174-75 (citing Lee Hockstader, *Crime Atop Chaos*, WASH. J., Mar. 20, 1995, at 6).

72. *Id.* at 175 (citing CNN Television Interview by Eileen O'Connor with Vadimir Rushailo, official, Russian Interior Ministry (March 17, 1995) (transcript 1049-9)).

73. Hendrix, *supra* note 11, at 36-37.

While he admits that physical intimidation and influence of judicial decisions exist, Hendrix does not believe it to be standard business practice.⁷⁴ Hendrix also points out that since Arbitrazh Courts do not have criminal jurisdiction, they are less exposed to criminal elements.⁷⁵

Hendrix also believes graft to be less common in the judiciary "because there are many judges who genuinely seek to uphold the law, [and] also due to the adversarial nature of the litigation process."⁷⁶ Because judicial acts are subject to appeal, there are limits to what a judge may do to influence an outcome.⁷⁷ Indeed, Hendrix says anecdotal evidence suggests that foreign parties have fared well in the cases decided, especially against the Russian tax authorities and in intellectual property rights cases.⁷⁸ Hendrix thus concludes that although problems may still exist, the Arbitrazh Courts serve a more effective role than Western accounts of the Russian legal system typically state.⁷⁹

Nevertheless, the effects of corruption on the judiciary's ability to remain unbiased and independent is also a consideration for parties when deciding how to resolve their disputes and whether to choose the Arbitrazh Courts as the forum to resolve their disputes.⁸⁰

3. *Enforcement Abroad of Arbitrazh Decision*

Lastly, even though a party would enjoy immediate enforcement of a judgment rendered by the Russian Arbitrazh Court, that party may face difficulties in having that same judgment enforced abroad.⁸¹ If enforcement of the Russian Arbitrazh Court is required abroad, such award is subject to execution in a foreign jurisdiction only to the extent that a foreign country recognizes and enforces Russian judicial decisions.⁸² Arbitrazh Court judgments do not enjoy mandatory enforcement under the New York Convention because they are not "foreign arbitral awards," but are foreign judicial decisions.⁸³ Thus, it appears that if a Russian party's assets are solely within Russia, the Russian Arbitrazh Courts may be a preferable forum, and vice versa.

74. *Id.*

75. *Id.* at 36.

76. *Id.* at 37.

77. *Id.* Hendrix suggests that the statistics of case volume and the value of the combined cases indicates that the courts must be doing something right. *Id.*

78. *Id.* at 38.

79. *Id.* at 39.

80. McGrory, *supra* note 64, at 83.

81. *Russia Overhauls System*, *supra* note 11, at 174.

82. *Id.*

83. *Id.* See Letter of Higher Arbitration Court, RF No. OM-37 of March 1, 1996 (clarifying that the New York Convention governs issues of mutual recognition and enforcement on the territory of the Convention member states of arbitral, not judicial, awards).

III. International Commercial Arbitration Courts Under the Chamber of Commerce and Industry

As mentioned, a common forum for arbitration (in the nonjudicial sense) in Russia is the Chamber of Commerce and Industry (CCI). The CCI was first established in 1932 and was later structured in the 1970s similar to other Western institutions in order to develop a positive international reputation.⁸⁴ A new law enacted by Russia in 1993 is the International Commercial Arbitration Act (the Arbitration Act) which was drafted based on the UNCITRAL Model Law⁸⁵ on International Commercial Arbitration.⁸⁶ Acting in conformity with the Arbitration Act are the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission, both under the CCI.⁸⁷ This Comment focuses on the ICAC.

Alan J. Koman points out, in an article comparing the Arbitration Act to past concerns about arbitrating in the CCI, that under the Soviet Union arbitration clauses were practically a standard practice in contracts between Western and Soviet parties (usually a foreign trade organization).⁸⁸ Koman also notes that most multinational companies, depending on their bargaining power, could get arbitration before a neutral institution in a third country, while a smaller Western party would usually settle for arbitration before the Foreign Trade Arbitration Commission or the Maritime Arbitration Commission in Moscow.⁸⁹ Besides the enactment of the Arbitration Act, another major development was a "massive shift of most of the bargaining power to the Western side."⁹⁰

A. IMPROVEMENTS IN THE CCI

1. Available Arbitrators

Arbitrators used to be chosen from a list of exclusively Russian citizens, raising questions of impartiality and governing language.⁹¹ The Arbitration Act, in article

84. Zinger, *supra* note 6, at 166.

85. The Model Law is a project undertaken by UNCITRAL (United Nations Commission on International Trade Law) "to rectify the 'pitfalls' or 'defects' of international commercial arbitration through uniformly applicable rules on a variety of topics from composition of the arbitral tribunal, conduct of arbitral proceedings, role of national courts, to recognition and enforcement of awards." Husain M. Al-Baharna, Keynote Speech, in *INTERNATIONAL ARBITRATION IN A CHANGING WORLD* 25, 34 (Albert Jan van den Berg ed., ICCA Congress Series No. 6, ICCA Bahrain Conference, 1993).

86. International Commercial Arbitration Act, *Sobr. Zakonod. RF*, 1993 No. 5338-1, preamble [hereinafter *International Arbitration Act*]. Article 1 stipulates that this Act shall apply to international commercial arbitration, if the place of arbitration is in the territory of the RF, but that provisions of articles 8, 9, 35, and 36 will also apply even when the place of arbitration is abroad. *Id.* art. 1.

87. The ICAC and the Maritime Arbitration Commission are permanent and independent arbitral tribunals (mediation courts) acting in conformity with the International Commercial Arbitration Act. *Id.* annex I, II. See also Regulations of the International Commercial Arbitration Court at the Chamber of Industry and Commerce of the Russian Federation, *Buill. Norm. Akt. RF*, 1995, § 1(1) [hereinafter *ICAC Regulations*].

88. Koman, *supra* note 5, at 26.

89. *Id.*

90. *Id.*

91. *Id.* at 28.

10, allows the parties to choose the number of arbitrators.⁹² Article 11 provides that "[n]o person shall be precluded by reason of his citizenship from acting as an arbitrator, unless otherwise agreed by the parties."⁹³ If the number of arbitrators is to be three, and the two chosen arbitrators of the parties are unable to agree on a third, then the court will choose the third arbitrator from the court's list.⁹⁴ The court will also choose an arbitrator from the list if the parties are unable to agree when a sole arbitrator is stipulated.⁹⁵ Koman presumes that if the court is to choose the third (or sole) arbitrator due to disagreement of the parties, the court will choose a Russian.⁹⁶ However, the ICAC's list also includes foreign arbitrators.⁹⁷ In any event, the parties are free to agree in advance on a selection procedure for a third (or sole) arbitrator in an arbitration clause.⁹⁸

2. *Choice of Language and Forum*

Other positive developments under the new Arbitration Act are the ability of the parties to choose the language of the proceedings as well as the forum.⁹⁹ Article 20 allows the parties to agree on the place of arbitration, and article 22 allows the parties to choose the language to be used in the proceedings.¹⁰⁰

In absence of agreement on these issues, the court is to decide based on the circumstances, including the inconvenience to the parties in the case of forum choice.¹⁰¹ Koman comments, "[i]t is hard to imagine a case involving a Western party and a Russian party where the court would pick some language other than Russian as the working language, unless it is required to do so by the parties' own agreement," and "[o]ne can safely predict that [the] court . . . will continue to find [Moscow] a very convenient site for settling disputes."¹⁰²

According to the ICAC Regulations, the place of arbitration shall be Moscow and the language shall be Russian, unless otherwise specified by the parties.¹⁰³ However, if the parties agree to hold the hearings at some other location, or in some other language, the additional costs for doing so (travel, lodging, and interpreters) will be imposed upon the parties to the dispute.¹⁰⁴ Therefore, if a party feels that arbitrating in Russian in Moscow would be undesirable, they

92. Article 10 states, "[t]he parties shall be free to determine the number of arbitrators. . . . Failing such determination, the number of arbitrators shall be three." International Arbitration Act, *supra* note 87, art. 10.

93. *Id.*, *supra* note 87, art. 11. See also ICAC Regulations, *supra* note 88, § 2(3).

94. International Arbitration Act, *supra* note 87, art. 11(3)(a).

95. *Id.* art. 11(3)(b).

96. Koman, *supra* note 5, at 28.

97. Hendrix, *supra* note 11, at 10.

98. Koman, *supra* note 5, at 28; see also International Arbitration Act, *supra* note 87, art. 19.

99. Koman, *supra* note 5, at 29.

100. International Arbitration Act, *supra* note 87, arts. 20, 22.

101. *Id.*

102. Koman, *supra* note 5, at 29.

103. ICAC Regulations, *supra* note 88, §§ 7, 10.

104. *Id.* The court may also demand the parties provide for such expenses in advance. *Id.* § 7(2).

have the opportunity to stipulate to the contrary in an arbitration clause.¹⁰⁵ In this case, the parties must be ready to accept the additional costs related to this choice. If the parties are silent, the choice by the ICAC will be arbitration in the Russian language, located in Moscow.¹⁰⁶

3. *Challenge of Arbitrators*

The Arbitration Act, in contrast to the old law, unmistakably allows arbitrators to be challenged.¹⁰⁷ Article 13 sets out the challenge procedure against arbitrators.¹⁰⁸ If an arbitrator does not withdraw after the agreed-upon procedures for a challenge are followed, then the arbitration tribunal shall decide the issue.¹⁰⁹ The arbitration tribunal's decision may be appealed to the president of the CCI, whose decision is not subject to appeal.¹¹⁰ While such decision is pending, the arbitration tribunal, including the challenged arbitrator, may continue the proceedings and make an award.¹¹¹

4. *Validity of Arbitration Clause and Choice of Law*

Koman also discusses the relative improvement involving the law governing the validity of the arbitration clause, as well as the validity of the contract itself.¹¹² He notes that although a court will judge the validity of an arbitration clause under Russian law regardless of what the parties do, with a limited amount of research in Russian law a binding clause can be written.¹¹³ With regard to choice of law, the parties' choice will be respected.¹¹⁴

5. *Bias of Communists*

Another previous concern was that the arbitrators were Communists.¹¹⁵ "Like all people who once held high office in the former Soviet Union, the Russian arbitrators serving on the case may have certain reservations about the virtues of capitalism."¹¹⁶ Koman suggests that the changing realities of life may make those arbitrators at least less dogmatic.¹¹⁷

105. Koman, *supra* note 5, at 29.

106. *Id.*

107. *Id.*

108. International Arbitration Act, *supra* note 87, art. 13.

109. *Id.* arts. 13, 6(1).

110. *Id.*

111. *Id.*

112. Koman, *supra* note 5, at 30.

113. *Id.* at 33.

114. *Id.*

115. *Id.* at 28.

116. *Id.* at 32.

117. *Id.*

6. *Interim Relief*

In some instances a down-side of arbitration is lack of the availability of interim relief: "Arbitrators may avoid requested interim relief measures because they do not want to appear to favor one party. Sometimes local law is hostile to interim relief orders, and under some circumstances, applying to a court for interim relief may be deemed a waiver of the agreement to arbitrate."¹¹⁸ Article 9 of the Arbitration Act simply states that "[i]t shall not be incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection, and for a court to grant such measure."¹¹⁹

It should also be noted that the ICAC Regulations state that the arbitral tribunal may grant interim relief.¹²⁰ Although this article is general in its terms, it suggests that Russian courts would not be hostile to interim relief orders by the ICAC itself, and that such act would not be considered as a waiver of the agreement to arbitrate.¹²¹ In any case, interim relief is available through the Russian courts should the ICAC not be willing to grant such relief itself.

7. *Duration of Proceedings*

As mentioned, most parties wish for a speedy resolution to their disputes.¹²² The ICAC Regulations address this issue and require that the ICAC take measures to be completed within 180 days from the date of selection or appointment of the arbitrator(s).¹²³ It should be mentioned, however, that at the request of the parties or upon the initiative of the ICAC, the hearing of the case may be laid off or examination suspended.¹²⁴ Methods to avoid excessive time delays through the drafting of arbitration clauses are discussed below.

B. REMAINING CONCERNS ABOUT THE ICAC

1. *Application of Foreign Law*

Although choice of law is respected by the tribunal and by Russian courts, the remaining problem is the risk that the court may misunderstand the foreign law it is to apply.¹²⁵ In the past, the court took a very independent approach and chose not to rely on foreign law experts.¹²⁶ The new law does allow for the court to appoint experts to report to it and allows the parties to give experts whatever

118. Fischer and Haydock, *supra* note 29, at 957.

119. International Arbitration Act, *supra* note 87, art. 9.

120. ICAC Regulations, *supra* note 88, § 30.

121. International Arbitration Act, *supra* note 87, art. 9.

122. Slate, *supra* note 29, at 43.

123. ICAC Regulations, *supra* note 88, § 11.

124. *Id.* § 36.

125. Koman, *supra* note 5, at 31.

126. *Id.*

information they require, and even allows the experts to appear at hearings.¹²⁷ However, Koman states that the lack of resources has a great deal to do with the continued ineffectiveness of the courts to apply foreign law.¹²⁸

There are no foreign law libraries in Russia and no government body in Russia is spending funds for such libraries.¹²⁹ Therefore, Russian experts and arbitrators have no effective means for independently researching foreign law.¹³⁰ While this may be true, there are several Western law firms in Russia that are able to supply such expertise.¹³¹ Their presence may assist the Western parties to a dispute, but for Russian parties, independent experts, and arbitrators, such advice may come at a prohibitively expensive price.¹³²

2. *Conflicts of Interest and Impartiality*

Conflicts of interest involving Russian arbitrators have also been a concern in the past.¹³³ Although the law again appears to address this problem, the economic realities of Russia's economy continue to create conflicts of interest problems.¹³⁴ The new law changed the old in that article 12(1) requires a potential arbitrator to "disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."¹³⁵

In addition, the parties may challenge the arbitrator's impartiality as discussed above.¹³⁶ The problem remains, however, that arbitrators (as with judges) may be affected by the economic pressures of Russia's society, as Koman notes:

Consider the economic pressure that the arbitrators . . . may be under. They are not on the payroll of the court. Their only compensation for their services comes from fees charged to the parties. . . . Offering hard-currency supplements to the arbitrators would only create a conflict of interest where none had existed before and would mortify the arbitrators, too. The new law has corrected the old problem with disclosure, but life has created a new one that is much harder to remedy.¹³⁷

Despite this potential for conflict and foreign party bias for arbitration in a neutral third country, actual practice has shown the ICAC in Moscow to be relatively

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Some American law firms include Akin, Gump, Strauss, Hauer & Feld; Baker & McKenzie; Baker & Botts; White & Case; and Vinson & Elkins, to mention only a few. There are other law firms from other European countries as well.

132. Average prices for lawyers working in Western firms in Moscow range from approximately \$100-\$400 per hour.

133. Under the old law, there was no rule giving the arbitrators an affirmative duty to disclose a conflict of interest in a particular case. Koman, *supra* note 5, at 29.

134. *Id.*

135. International Arbitration Act, *supra* note 87, art. 12(1).

136. *Id.* art. 13.

137. Koman, *supra* note 5, at 29.

unbiased.¹³⁸ In any case, it is a problem that deserves forethought in deciding where to arbitrate.

3. *Collection of Evidence*

Discovery represents another area of continuing concern.¹³⁹ Previously, a party was not allowed to conduct anything like American pre-trial discovery, and a party could not compel the adverse party, witnesses, and experts to appear at hearings.¹⁴⁰ Additionally, witnesses were not sworn and cross-examination was limited.¹⁴¹ Now, under the Arbitration Act, a party may request assistance in taking evidence from a competent court in Russia, but as Koman notes, they will only have the discovery tools provided under the Russian rules of civil procedure.¹⁴² Koman concludes that "[r]ealistically, the Western party should just collect whatever information and documents he wants before a dispute breaks out."¹⁴³

4. *Lack of Equitable Decision-Making*

Koman points to two other concerns, namely that the arbitration proceedings in the ICAC are much like a trial, and that arbitrators simply apply law to facts without the ability to make equitable decisions based on what is right or fair.¹⁴⁴ Koman feels that this is the most important point to grasp about arbitrating in Russia:

In deciding a case, Russian arbitrators will only look to see what result is required by the law that applies to the transaction. They will not settle a dispute by doing what is just and equitable (*ex equo et bono*), even if the parties have expressly authorized this in their arbitration agreement. They will also not settle a dispute with a decision that is based on "general principles of law" or on *Lex mercatoria*. Under both the old and new laws, they will look only to the applicable law, the terms of the contract, and any applicable usages of trade, nothing more.¹⁴⁵

Thus, one should note how important an effective choice of law clause becomes in arbitration in the CCI, because the arbitrators are not permitted to base their decisions on any principles other than the applicable law.¹⁴⁶

138. John I. Huhs & Ramaz A. Beridze, *Dispute Resolution in Russia*, AM. LAW. NOV. 1992, at 33. American companies are using the ICAC more frequently, and the ICAC case load is substantially higher than that of the Stockholm Chamber of Commerce. Hendrix, *supra* note 11, at 7.

139. Koman, *supra* note 5, at 31.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 33.

144. Arbitration proceedings before the major Western institutions are fairly loose and freewheeling. The atmosphere and tone of an arbitration in Russia could not be more different. The court in Russia has a semi-official status. It prefers formality to informality. It applies procedural and substantive law fairly strictly. It views its prior decisions as precedents, and it tends to strictly enforce contracts. In fashioning a remedy, it prefers specific performance to a simple award of money damages.

Id. at 31.

145. *Id.* at 32.

146. *Id.*

5. *Legal Fees and Arbitration Costs*

A last remaining concern of Koman's is that legal fees are not recoverable under the Arbitration Act, as with the previous law.¹⁴⁷ However, the ICAC Regulations state that the victorious party may demand compensation for reasonable losses borne by it, including expenses for legal representatives.¹⁴⁸ The arbitration fee is to be paid by the losing party.¹⁴⁹

6. *Enforceability of Awards*

Enforceability of an award by the ICAC was not really a problem in the former Soviet Union.¹⁵⁰ However, an increasing number of new Russian enterprises are no longer funded by the state and are inexperienced in international business matters, thus causing an increase in the amount of disputes arising.¹⁵¹ Due to the financial independence of the Russian enterprises from the state, arbitration awards are no longer paid as a matter of course.¹⁵²

Another concern is that the Arbitration Act does not address the procedure for enforcing arbitral awards. Although Russia (as a successor to the Soviet Union) is a signatory to the New York Convention on the enforcement of foreign arbitral awards, legislation has not been enacted in Russia regarding the precise procedure for the enforcement of awards under the Convention.¹⁵³ There is lack of practical experience with enforcement of foreign arbitral awards in Russia.¹⁵⁴ The courts may be uncertain as to procedures and processes required to execute the foreign

147. *Id.*

148. ICAC Regulations, *supra* note 88, app. § 9.

149. *Id.* § 6.

150. Huhs & Ramaz, *supra* note 140, at 33. "[I]f the Soviet party actually did go to arbitration and lose, the award would be paid in due course pursuant to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards." *Id.*

151. *Id.* Huhs & Ramaz observe:

The burst of entrepreneurial activity by newly freed—but internationally inexperienced—Russian enterprises, which for the most part are no longer funded by the state budget and therefore survive (or fail) based on their own resources and resourcefulness, has dramatically increased litigation between Russian and foreign enterprises. . . . Arbitration awards are no longer paid as a matter of course, because they now must be paid from the resources of the enterprise involved rather than by the state.

Id.

152. *Id.*

153. *Id.* Huhs and Ramaz then describe the most accepted procedure (based on Russian procedural law):

[The most common method] is to present a legalized original of the award through diplomatic channels to the local court having jurisdiction for execution. The court can then order the bank holding the funds of the Russian party to pay such funds over to the foreign party. If the liquid asset [sic] of the debtor are not sufficient to satisfy the award, the court can order the bailiff to execute on the physical property of the debtor and to pay the proceeds over to the foreign party.

Id.

154. *Id.*

award, which may be tedious, time consuming, and expensive.¹⁵⁵ In any case, it is unlikely that many Russian parties will possess sufficient assets that can easily be converted into hard currency to pay a substantial award to a foreign party.¹⁵⁶

If an award is enforceable, another question arises as to the challenges that may be raised against that award to have it set aside by a judicial court. Here, the Russian Arbitration Law is in accordance with the New York Convention, both of which set forth the grounds for a national court to set aside an arbitral award.¹⁵⁷ Both require proof of the following to set aside a judgment: (1) incapacity of party or invalidity of agreement under applicable law; (2) lack of proper notice of the appointment of an arbitrator or arbitral proceeding or lack of ability of party to present its case; (3) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration; or (4) the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties.¹⁵⁸

Enforcement of an arbitral award may also be refused if a court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian Law or that the award is in conflict with the public policy of the Russian Federation.¹⁵⁹ Thus, the chances that a decision will be overturned by a Russian court are not much different from the chances a court in another country (that is a signatory to the New York Convention) would. Generally speaking, the above grounds are applied narrowly and such actions are rarely taken.¹⁶⁰ Although

155. [Russian Courts] are likely to be uncertain regarding the precise procedures to follow, and the process of identifying, seizing, and converting the assets of the Russian party to cash in a form that can be paid over to a foreign party is likely to be tedious, time-consuming, and expensive.

Id.

156. *Id.*

157. International Arbitration Act, *supra* note 87, art. 34; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 5 [hereinafter New York Convention]. See also Recognition and Enforcement in the USSR of Foreign Judgements and Arbitrations, June 21, 1988, art. 5, available in 1988 WL 386572.

158. International Arbitration Act, *supra* note 87, art. 34(2)(a); New York Convention, *supra* note 158, art. 5(1).

159. International Arbitration Act, *supra* note 87, art. 34(2)(b); New York Convention, *supra* note 158, art. 5(2).

160. The U.S. courts have a consistent record of enforcement of foreign awards based on a restrictive reading of the exceptions under the New York Convention. David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS 'JUDICIALIZATION' AND UNIFORMITY? 163, 165 (Richard B. Lillich & Charles N. Brower eds., Transnat'l Publishers, Inc. 1994) [hereinafter INTERNATIONAL ARBITRATION IN THE 21ST CENTURY]. Cases such as *Scherk v. Alberto-Culver*, 417 U.S. 506, 94 (1973), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), have "established strong pro-arbitration federal policy in favor of enforcing arbitral clauses and awards in the international context." *Id.* "As a practical matter, [these cases] have functioned as the decisional equivalent of the recently adopted arbitral statutes in various European countries which have accorded as a matter of public policy greater enforceability to foreign as compared to domestic awards." *Id.*

it is unclear, there is evidence that suggests Russian courts will apply a similar narrow approach in applying the exceptions.¹⁶¹

7. Ability to Override National Procedural Rules

As demonstrated above, the flexibility given by the Arbitration Act played a large role in improving the CCI/ICAC and therefore made the ICAC a more attractive forum than in the past.¹⁶² However, one criticism of this flexibility is that it goes too far in allowing the parties to override national procedural rules.¹⁶³ This fact has the effect of excluding the applicability of rules of procedure prescribed by arbitration law, code of civil procedure, or national rules on evidence, thus "removing the system of checks and balances derived from procedural law of *lex fori* and, concomitantly the role of national courts," and therefore depriving parties of the assurance of due process of law.¹⁶⁴

Despite the criticism, the flexibility is a positive aspect of the Arbitration law. The flexibility can help the parties ensure the impartiality of the proceedings, as well as assist them in ensuring a speedy resolution of their dispute in a country in which impartiality and effectiveness of dispute resolution are and may remain questionable in light of the realities of today's Russian society and economy.¹⁶⁵ Thus, the drafting of arbitration clauses will play a particularly important role for parties to a contract involving Russian-related issues.

C. COSTS OF ARBITRATION IN THE CCI/ICAC.

Upon the filing of the statement of a claim, the plaintiff is required to pay a nonrefundable \$500 registration fee that is set against advance arbitration fee

161. See Hendrix, *supra* note 11, at 6.

162. Koman, *supra* note 5, at 33; Keva, *supra* note 5, at 709.

163. "Traditionally . . . parties specify the applicable substantive law, leaving procedure to the law of the place of arbitration." Al-Baharna, *supra* note 86, at 35. Article 19 of the International Arbitration Act (and UNCITRAL Model Law) changes this by allowing the parties to freely agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. International Arbitration Act, *supra* note 87, art. 19(1).

164. Al-Baharna, *supra* note 86, at 35.

165. Howard M. Holtzmann discusses the need to strike a balance between certainty and flexibility in international arbitration. Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY*, *supra* note 161, at 3, 5. He concludes that users of arbitration do not desire to have new, or supplementary, rules that provide more certainty and less flexibility than existing systems:

There is mounting evidence that users of international arbitration are satisfied with the balance between flexibility and certainty struck by the UNCITRAL Arbitration Rules [adopted by the Russian Federation], . . . [and] Institutions that are highly sensitive to the desires of users . . . continue to believe that international cases are best conducted under rules that provide a balance between certainty and flexibility such as that embodied in the UNCITRAL Arbitration Rules.

Id. See, generally, Koman, *supra* note 5; Huhs and Ramaz, *supra* note 139.

payments.¹⁶⁶ The arbitration fee is calculated in U.S. dollars based on a scale beginning with a minimum of \$1,400 for claims under \$10,000, and a maximum of \$39,440 plus 0.1 percent of the sum over \$10 million.¹⁶⁷ The ICAC may also impose a duty on the parties to supply advance payment for certain additional expenses.¹⁶⁸ In particular, the ICAC may demand advance payment to cover additional expense of the party requesting the action.¹⁶⁹ Parties that request an arbitrator residing outside of the place where the ICAC is conducting the hearings must provide an advance payment to cover the arbiter's expenses.¹⁷⁰ The same is true for translation costs, but if the language chosen is one other than Russian, costs are shared equally by the parties.¹⁷¹

Taking into consideration the above observations, it is possible that because the arbitration process in the ICAC is so much like a trial in which the law is simply applied to the facts, and that the costs under the ICAC may be considerably more than those under the Arbitrazh Courts, there is no real advantage to arbitrating in the CCI/ICAC as opposed to the Arbitrazh Courts.¹⁷² However, the flexibility allowed under the CCI/ICAC for parties to agree to terms and procedure in arbitration clauses will likely mean this is, and will remain, the preferred forum.¹⁷³

IV. Other Fora for International Arbitration

International commercial arbitration has become a commercial industry in its own right, with several competing arbitral institutions to choose from.¹⁷⁴ This comment focuses on the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) and the International Chamber of Commerce (ICC).

166. ICAC Regulations, *supra* note 88, § 18, app. § 2. The chairman of the ICAC has the right to pass a ruling on raising the amount of the arbitration fee. *Id.* app. § 3(2). There are also instances in which the arbitration fee can be reduced (*e.g.*, single arbiter, early withdrawal, or termination without a decision). *Id.* app. § 4.

167. *Id.* app. § 3(1).

168. *Id.* app. § 7.

169. *Id.*

170. *Id.*

171. *Id.*

172. Koman, *supra* note 5, at 31; ICAC Regulations, *supra* note 88, app. § 3(1).

173. For a claim of \$1,000,000, the Arbitrazh Court state duty is capped at a maximum of approximately \$14,000, while the ICAC costs would be \$16,240. Hendrix, *supra* note 11, at 8, 25. The CCI remains the preferred forum over the Russian judicial courts, offering experience in international contract disputes and offering the freedom to choose the law governing the dispute. Zinger, *supra* note 6, at 168.

174. Al-Baharna, *supra* note 86, at 30. Figures show that in terms of venue, France is the most favored place, followed by Switzerland, the United Kingdom, the United States, Germany, Austria, and Sweden. Julian Lew, *Business and the Law: The Facts of Arbitration: English Pre-eminence Has Proved a Myth*, FIN. TIMES LTD., May 21, 1996, at 32.

A. ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

The SCC Institute was founded in 1917.¹⁷⁵ Parties to Russian-American contracts often choose the SCC Institute for resolution of contract disputes, and Russian businesses tend to prefer this forum.¹⁷⁶ This preference developed when Russia was still part of the Soviet Union because Sweden is neutral and convenient for the Russians.¹⁷⁷ Due to this preference, in 1976 Sweden partially revised its arbitration laws based on a study conducted by the Russian CCI and the American Arbitration Association to determine the acceptability of Sweden as an international arbitration center.¹⁷⁸ Since then the SCC Institute functioned as an international arbitration institution and became particularly known for handling disputes involving East-West trade.¹⁷⁹ Effective January 1, 1988, the SCC Institute began to promulgate its own arbitration rules that will apply unless the parties otherwise agree.¹⁸⁰

1. *Reasons to Arbitrate in the SCC Institute*

Swedish neutrality played a large role in its popularity in East-West trade in the past, and the SCC Institute grew in popularity as an international arbitration forum partly for this reason.¹⁸¹ On the significance of the place of arbitration as a practical and psychological factor, Edwin R. Alley, in a review of the SCC Institute, refers to some of the considerations that bear on the selection of the location of the proceedings: ease of transportation to the arbitration site for the parties; local infrastructure of the arbitration site (*i.e.*, roads, hotels, meeting facilities, communications); and an independent and neutral country for the arbi-

175. The SCC Institute is one of the leading arbitration centers in the world. SCC ARBITRATION, THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, Chs. 1, 2. It is an independent entity within the Stockholm Chamber of Commerce. *Id.* It is a forum for domestic and international dispute resolution, playing an essential role in the Swedish legal system. This is the Stockholm Chamber of Commerce. <<http://www.chamber.se/english/en1.htm>>.

176. *Russia Overhauls System*, *supra* note 11, at 174; Russian businesses prefer arbitration under the rules of the Stockholm Chamber of Commerce. Lew, *supra* note 175, at 32.

177. John P. Karalis, *International Joint Ventures: A Practical Guide*, JOINTVEN § 5.42 (1992).
178. *Id.*

179. Jean Heilman Grier, *Providing for Arbitration in International Business Transactions*, 863 PRACTICING L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 9, 21 (1994); the SCC Institute "became an important center for international arbitrations involving Russia and the other states of the Soviet Union, and subsequently China as well." W. Lawrence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 14 (1995).

180. These rules were designed after a study of rules of the ICC, UNCITRAL, London Court of International Arbitration, and the AAA in an attempt to take the best from each set of rules and to omit unnecessary or unacceptable rules. Karalis, *supra* note 178.

181. "The SCC Institute, whose potential in such arbitrations results in part from Sweden's neutrality as well as from its long history of legal sanction [sic] for arbitration, is also being increasingly used in non-East/West trade disputes." Edwin R. Alley, *International Arbitration: The Alternative of the Stockholm Chamber of Commerce*, 22 INT'L LAW. 837, 839 (1988).

tration.¹⁸² Sweden certainly makes an attractive forum in terms of neutrality but its convenience will depend on the location of the respective parties.¹⁸³ If the Russian party is in European Russia, Sweden may well be convenient, but for parties located in Siberia or the Russian Far East, Sweden may not be the most convenient forum for dispute resolution.¹⁸⁴

As with the Russian Arbitration Act, the rules under the SCC Institute allow a great deal of flexibility for the parties to select the applicable arbitration procedure (many choose the UNCITRAL rules) and the applicable law governing the dispute, as well as the place of arbitration and language or languages to be used.¹⁸⁵ In the event the parties fail to agree on these aspects, the tribunal makes the determination according to the applicable rules.¹⁸⁶ The same is true for the selection of arbitrators.¹⁸⁷

The SCC Institute rules help ensure the neutrality of the arbitrators (who may be of the same nationality) by requiring them to disclose "any circumstances which might be deemed to diminish trust in his impartiality or independence,"

182. *Id.* at 841.

From a purely practical point of view it is important that the place of arbitration is situated in a country and city to which there is easy transport from the country of residence of the parties and to which the parties and their lawyers have easy access. . . . Local facilities with respect to hotels, meeting rooms, mail and telex connections, . . . must be satisfactory. . . . It is very important that the parties are confident that their dispute is determined in an independent and neutral manner. The choice of the place of arbitration is important also in this respect. One of the reasons why parties to an international contract agree to arbitration is the wish to have a neutral decision.

Id. (quoting Philip, *Significance of the Place of Arbitration in International Arbitration*, 1985 Y. B. ARB. INST. STOCKHOLM CHAMBER COM. 37).

183. Huhs and Ramaz, *supra* note 139, at 33.

184. *Id.* Huhs and Ramaz note:

[I]t has become virtually important to focus in detail on the dispute resolution mechanism in legal documents concluded with Russian parties. Third-country arbitration is still preferred . . . [but] [f]or purely domestic transactions between a foreign-owned Russian company and a domestic party, arbitration in Russia (or even use of the Russian courts) may be more practical, particularly if the Russian party is remotely located, far from Western Forums.

Id.

185. Harry Arkin, *New Opportunities for Arbitration in East/West Trade*, 3 TRANSNAT'L LAW. 495, 507 (1990); "The SCC Institute often is chosen as an appointing authority under the UNCITRAL Rules." Alley, *supra* note 182, at 839; Karalis, *supra* note 178 (parties may agree on the language or languages to be used in the arbitration).

186. Karalis, *supra* note 178.

187. The SCC method for choosing an arbitrator is also similar to that of the Russian rules: In SCC Institute arbitration, there are three arbitrators, unless the parties agree otherwise. If there is a sole arbitrator, he or she is appointed by the SCC Institute; if there is more than one, the parties appoint an equal number and the SCC Institute appoints one arbitrator, who is the chairman. The Institute will appoint all members of the panel if the parties agree. Parties who are interested in avoiding delay in the appointment phase of the proceedings may prefer the advantage that inheres when the Institute appoints the neutral arbitrator.

Alley, *supra* note 182, at 840.

and subjecting them to challenges from the parties.¹⁸⁸ "In practice, most SCC Institute arbitrations 'run very smoothly,' and such problems as challenges to arbitrators, refusals by parties to participate in the proceedings, and objections to the validity or applicability of the arbitration agreement are infrequent."¹⁸⁹

The limited ability to challenge an award under the SCC Institute rules is also seen as making it an attractive forum for international arbitration.¹⁹⁰ Under the Swedish Arbitration Act, a challenge to an award must be received within sixty days after the receipt of the award.¹⁹¹ The reviewing court cannot substitute its own judgment, and must give great deference to the arbitrator's decision.¹⁹² The challenges to a decision are that the arbitrators (1) went beyond the scope of the issues presented; (2) rendered the arbitral award after the agreed-upon time expired; (3) decided a case that is nonarbitrable in Sweden; or (4) were disqualified to serve or that the decision was probably influenced by an irregularity in the procedures.¹⁹³ In addition to the finality of the award, another strength of the SCC Institute is the high likelihood that the judgment will be enforced in light of Sweden being a signatory to both the New York Convention and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards.¹⁹⁴

The cost of arbitration under the SCC Institute is determined by the arbitrators on a case-by-case basis based on time spent, complexity of the case, and the amount in dispute.¹⁹⁵ Alley notes that although the parties are jointly and severally liable for the fees due to the SCC Institute and to the arbitrators, the tribunal will usually order the losing party to pay the SCC Institute and the arbitrators, as well as the costs of the prevailing party.¹⁹⁶ To help ensure payment, security for costs is posted at the outset of a dispute that is meant to cover anticipated compensation of the arbitrators and the SCC Institute.¹⁹⁷

Perhaps one of the more compelling reasons to choose the SCC Institute is its ability to handle complex cases and its experience in dealing with Russian

188. *Id.*

189. *Id.*

190. *Id.* at 844.

191. Karalis, *supra* note 178, § 5.42 n.11.

192. *Id.*

193. *Id.*

194. Alley, *supra* note 182, at 842.

195. *Id.* at 843. The arbitrators determine the amount of compensation due to them in their final award. SCC Institute Rules § 30 (1988). In addition to remuneration, they are also to receive reimbursement of their expenses. SCC Arbitration, *supra* note 176, ch. 12. Since most Swedish arbitrators are practicing attorneys, the fees are normally in line with those of the attorney-arbitrator. The compensation due to the SCC Institute is normally fixed in accordance with the regulations issued by the SCC Institute. *Id.* The regulations provide ranges based on the amount in dispute. *Id.* The minimum amount due is 2,000 Swedish Crowns. See SCC Institute Rules Regulations app. *Id.* The percentages for the ranges vary from 4% of the amount in dispute (up to 100,000 Swedish Crowns) to as little as 0.01% of the amount in dispute (over 100,000,000 Swedish Crowns). *Id.*

196. Alley, *supra* note 182, at 843.

197. This amount posted is not binding on the final determination of amounts due at the end of the process.

parties involved in international disputes.¹⁹⁸ Alley concludes that although it is not among the largest of the international arbitration forums, the SCC Institute has achieved a respected role in international arbitration, and parties who are about to enter into a contract that will contain an arbitration clause clearly can consider that Institute to be a dispute resolution forum that will act impartially and expeditiously, and that will have adequate institutional expertise and facilities to accommodate even complex arbitrations.¹⁹⁹ This is not to say that the SCC Institute is without criticism.

2. *Potential Problems with the SCC Institute*

Although the SCC Institute rules provide that arbitrators make their award not later than one year after the case is referred to them, the rule also authorizes the Institute to extend the period under appropriate circumstances at the request of the arbitrators.²⁰⁰ As Alley observes, in practice this time limit has occasionally proven to be too short, especially when dealing with East-West trade disputes.²⁰¹

Tom Arnold, in an article focusing on the hidden booby traps of unexpected delay and cost in arbitration, states that unless case management and expedition are addressed in an arbitration clause to a contract, the parties will face time delays that may exceed a year.²⁰² One of the reasons for this delay is that arbitrators have other responsibilities and receive a number of smaller, easier projects that take up their time, never giving them the large amount of time desired for a complex case.²⁰³ Arnold believes this is particularly common in complex, three-arbitrator cases.²⁰⁴ While time delays may be a problem in the SCC Institute, parties may avoid such delays through arbitration clauses explicitly requiring an expeditor for case management, a specific time period for the resolution of the

198. "SCC arbitrations cover the usual range of subjects of international arbitration, such as sales contracts, construction projects, license agreements, and many other categories of commercial issues. The international cases on the SCC Institute's docket typically are substantial and complex." Alley, *supra* note 182, at 839.

199. *Id.* at 844.

200. *Id.* at 842.

201. *Id.*; Arkin, *supra* note 186, at 507. (SCC Institute subject in practice to increasing criticism of lack of timelines).

202. Arnold, *supra* note 38, at 104.

203. *Id.* at 106.

204. *Id.* Arnold notes that when three arbitrators are used, there may be scheduling difficulties, especially when the arbitrators are busy people who will find it difficult to find many days in sequence to attend the proceedings (and to travel to those proceedings). *Id.* at 111. Another reason for the increased time delay with three arbitrators is that among three arbitrators, none will essentially effectively assume the role of case manager and expeditor. *Id.* Yet another reason for delay is that the drafting of a decision by three arbitrators involves more time and money to negotiate a consensus. *Id.* In an attempt to avoid error in the reasons for the award (and thus a challenge of the award), the arbitrators try to be careful even on immaterial facts. *Id.* at 118. "You cannot imagine the immense amount of time that three people can spend checking details the other guy had in his draft reasons only some of which are material." *Id.* Lastly, the delay of one of the arbitrators affects all of them. *Id.* at 106.

dispute, and other provisions that will reduce the amount of delay due to dilatory arbitrators.²⁰⁵

Another potential for delay may be caused by the SCC Institute's liberal rules regarding the appearance of counsel and admissibility of evidence.²⁰⁶ Arnold suggests that if proper precautions are not taken in drafting an arbitration clause, the parties may be highly frustrated by "having arbitrator(s) receive monumental amounts of prejudicial, immaterial and/or redundant evidence costing months of time and thousands of dollars in associated fees and costs; . . ."²⁰⁷ Therefore, without taking the proper precautions, arbitration under the SCC Institute may cause problems due to its liberal admission of evidence.²⁰⁸ But again, this problem can be remedied through a thoughtful arbitration clause.²⁰⁹

B. THE INTERNATIONAL CHAMBER OF COMMERCE INTERNATIONAL COURT OF ARBITRATION

The International Chamber of Commerce (ICC) is still the most widely used and respected international arbitration institution.²¹⁰ The ICC was founded in 1923 in Paris, France, and is a nongovernmental organization composed of representatives of more than fifty countries from nearly every continent.²¹¹ The main functions of the ICC in overseeing an arbitration process are (1) designating arbitrators; (2) reviewing and confirming appointment of arbitrators nominated by the parties; (3) reviewing and deciding challenges to arbitrators; (4) scrutiniz-

205. These will be discussed further below. See generally Arnold, *supra* note 38, chs. 5(a-i), 6.

206. Alley, *supra* note 182, at 842. Alley observes:

The parties may choose any person to assist them, whether or not a lawyer, and the Rules contain no limitation in that respect. Absent an agreement to the contrary, an arbitrator may consider both written and oral evidence, and there are very few, if any, restrictions upon the admissibility of evidence in Swedish arbitration proceedings. Under the Rules, the tribunal may appoint an expert witness.

Id.

207. Arnold, *supra* note 38, at 116. Arnold outlines the problem as follows:

[P]arties introduce prejudicial slurs at each other, often by immaterial or redundant evidence. The responses to that prejudicial evidence then also come in, and pretty soon you are "trying" a myriad of immaterial prejudicial issues with relatively little attention to the issue submitted to arbitration in the contract to arbitrate, and at tremendous expense in time and money.

Id. at 116.

208. *Id.*; Alley, *supra* note 182.

209. Arnold suggests the following language: "[t]he arbitrator shall have the power and authority and is instructed to exclude evidence on grounds of prejudice, immateriality and/or redundancy, and no ruling by the arbitrator rejecting evidence on such ground shall be a ground for vacating the arbitration award." Arnold, *supra* note 38, at 117.

210. Lew, *supra* note 175, at 32. In 1995 the court's activity continued to increase as it has over the past 20 years, and for the first time the ICC received more than 400 new requests for arbitration. 7 ICC INT'L COURT OF ARB. BULLETIN NO. 1 (May 1996). This is in addition to the 855 cases pending at the end of 1995. *Id.* In 1996 the ICC received their 9,000th case. *Id.*

211. ICC Int'l Court of Arb. 6 (June 1994).

ing and approving awards; and (5) fixing arbitrators' fees.²¹² Generally speaking, the ICC goes further in providing institutional guidance and supervision over the arbitration proceedings than do the rules of other institutions.²¹³

1. *Advantages of Arbitrating in the ICC*

One of the main focuses of the ICC is the maintenance of trust between the parties and the person that may be required to resolve their dispute.²¹⁴ To achieve this the ICC has safeguards to (1) ensure the impartiality of the arbiter; (2) ensure the arbiter is competent in the subject matter; and (3) ensure that the arbiter knows the law and practices of international trade.²¹⁵

As with most arbitration institutions, neutrality and impartiality can be facilitated in the ICC by the choice of nationality of arbitrators, the place of the proceedings, and the language of the proceedings.²¹⁶ For the designation of arbitrators, the ICC differs from the SCC Institute and the ICAC, in which three arbitrators are designated if the parties fail to nominate the number of arbitrators.²¹⁷ Under the ICC Rules of Arbitration, a dispute may be settled by a sole arbitrator or by three arbitrators.²¹⁸ If the parties select a sole arbitrator, they may nominate the arbitrator for confirmation by the court.²¹⁹ If the parties fail to nominate a sole arbitrator, the arbitrator is appointed by the court.²²⁰ Likewise, if the parties do not agree upon the number of arbitrators, a sole arbitrator is appointed by the court.²²¹ "Particularly when the amount in dispute is small, the designation of more than one arbitrator can increase quite considerably, and unreasonably, the cost of an arbitration and also delay the prosecution of the case."²²²

An additional emphasis in the ICC is on the use of arbitrators experienced in international trade.²²³ For this purpose, the ICC Court enjoys the assistance of the ICC National Committees in nearly sixty different countries, which assist the ICC Court in identifying potential arbitrators with appropriate qualifications

212. *Id.*

213. Slate, *supra* note 29, at 47.

214. H. Frans van den Hoven, *Commercial Disputes and Their Settlement: A Factor in Business Planning*, in 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 35, 37 (ICC Publishing S.A., 1984).

215. *Id.*

216. *Id.* at 45 (Commentary by Jean-Pierre Bouyssou). See generally ICC Rules of Conciliation and Arbitration.

217. International Arbitration Act, *supra* note 87; Alley, *supra* note 182.

218. ICC Rules of Conciliation and Arbitration, art. 2.2.

219. *Id.* art. 2.3.

220. *Id.*

221. *Id.* art. 2.5. However, when it appears to the court that the dispute warrants the appointment of three arbitrators, each party is given 30 days to nominate an arbitrator. *Id.*

222. The ICC Int'l Court of Arb. 7 (June 1994).

223. "National judges rarely have the same knowledge of the customs of international trade as do arbitrators, especially when it is not a question of codified trade customs. . . ." Bouyssou, *supra* note 217, at 46.

all over the world.²²⁴ The parties are also free to choose their own arbitrators without being restricted to a list.²²⁵ In the event an arbitrator (or tribunal chairman) is appointed by the ICC Court, that arbitrator is generally forbidden to be of the same nationality as either of the parties.²²⁶ Taken together, these provisions go further than the SCC Institute and the ICAC in ensuring the impartiality and expertise of the arbitrators.

As seen with other fora, the ability to choose the applicable law, place, and language of the proceedings is also available under the ICC in order to ensure impartiality and neutrality.²²⁷ The arbitrators are required to disclose any facts or circumstances that may call into question the arbitrator's independence in the eyes of the parties, and the parties also have the ability to challenge an arbitrator they believe to be biased or otherwise unacceptable.²²⁸

The intervention of a strictly international institution such as the ICC also helps to maintain neutrality.²²⁹ "Unlike many other institutions, the ICC Court monitors the entire arbitral process, from the time the arbitral tribunal receives the file from the ICC."²³⁰ The ICC regularly reviews the progress of all pending cases, and considers whether any measures needed to be taken to ensure that the case advances expeditiously and according to the rules.²³¹ The staff of the Court's Secretariat receives copies of all written communications and pleadings in the arbitration proceedings.²³²

One unique aspect of the ICC's involvement is the drafting of "terms of reference." The terms of reference bring the parties together at an early stage to consider the issues they are required to deal with and the organization of the arbitration.²³³ It is here that the parties may also reach agreement on certain

224. The ICC Int'l Court of Arb. 7 (June 1994).

225. "[T]he ICC does not require that arbitrators be selected from pre-determined lists, thus ensuring the greatest possible freedom of choice in the constitution of the arbitral tribunal." *Id.*

226. ICC Arbitration Rules article 2.6 provides:

The sole arbitrator or the chairman of the arbitral tribunal shall be chosen from a country other than those of which the parties are nationals. However, in suitable circumstances and provided that neither of the parties objects . . . the sole arbitrator or the chairman of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

ICC Rules of Conciliation and Arbitration, art. 2.6.

227. *Id.* arts. 12, 13.1, 13.3; ICC Int'l Court of Arb. 9 (June 1994).

228. ICC Rules of Conciliation and Arbitration, art. 2.7.

229. The Court of Arbitration is made up of members nominated by different National Committees of the organization. The ICC Int'l Court of Arb. 7 (June 1994).

230. *Id.*

231. *Id.* at 8.

232. *Id.*

233. *Id.* at 7. Before proceeding with a case, the arbitrator is to draw up a document defining his Terms of Reference. ICC Rules of Conciliation and Arbitration, art. 13.

The document is to include: a) the full names and description of the parties, b) the addresses of the parties to which notifications or communications . . . may be made, c) a summary of the parties' respective claims, d) definition of the issues to be determined, e) the arbitrator's full name, description and address, f) the place of arbitration,

outstanding issues that were not agreed upon in advance, such as substantive law or applicable language.²³⁴

The ICC Court is also involved in setting the arbitrator's fees.

[T]he arbitrators are not remunerated on the basis of an hourly or daily rate, and the arbitrators play no role in determining their own fees. Rather, their fees are fixed by the ICC Court at the end of the arbitration on the basis of a published scale attached to the ICC Rules. . . . [T]he Court also takes into account the time spent by the arbitrators, the rapidity of the proceedings and the complexity of the dispute.²³⁵

The intention of this system is to encourage the efficient handling of cases with the fee compatible to the amount at stake in arbitration, and to discourage the submission of frivolous claims and counterclaims.²³⁶ The scale also allows the parties to estimate the cost of arbitration at the beginning of the process.²³⁷

Unlike most arbitration institutions, under the ICC it is not the arbitrator who decides the *prima facie* validity of the arbitration; it is the institution that has the authority to make this determination.²³⁸ Likewise, after an award is rendered, the ICC Court is once again involved, as scrutiny of arbitral awards is one of the most important functions of the ICC Court.²³⁹

In ICC arbitration . . . scrutiny is a key element in helping to ensure that arbitral awards are of the highest quality possible and less susceptible to annulment in the national courts than they might otherwise be. . . . The scrutiny process . . . provides parties with an additional layer of protection that would not otherwise be available, since arbitral awards are not generally subject to appeal [in other arbitration institutions]. . . .²⁴⁰ The heavy institutional involvement of the ICC in the arbitral process helped it achieve its reputation for fairness, quality, and impartiality.²⁴¹

2. Criticisms of the ICC

The ICC's quality control measures discussed above lead to criticisms due to the additional cost and time added by those measures.²⁴² The former vice-president,

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as *amiable compositeur*, h) such other particulars as may be required. . . .

Id.

234. The ICC Int'l Court of Arb. 16 (June 1994).

235. *Id.* at 8. The scale for administrative expenses ranges from a minimum of US\$2,000 for disputes up to \$50,000 to \$65,500 for disputes over \$80 million. ICC Rules, app. III. The scale for arbitrator's fees ranges from a minimum of \$2,000 or 15% of the amount in dispute for disputes up to \$50,000 to 0.01%-0.05% of the amount in dispute for disputes over \$100 million. *Id.*

236. *Id.*

237. *Id.*

238. Slate, *supra* note 29, at 47. See ICC Rules of Conciliation and Arbitration, arts. 7, 8.3.

239. The ICC Int'l Court of Arb. 6 (June 1994).

240. *Id.*

241. In the words of a former vice president of the ICC, "[t]here is no denying that the ICC offers a mechanism for international institutional arbitration which is unique in the world, for it stands for impartiality, expertise, experience and competence of its arbitrators." H. Frans van den Hoven, *supra* note 215, at 37.

242. *Id.*

quoted above, also acknowledges that the ICC is criticized for being expensive and slow, and that the appointment procedures may be complicated.²⁴³

Tom Arnold asserts that one is almost guaranteed over a year longer in time and over \$100,000 added expense in a complex international license or other commercial dispute when transaction lawyers, inexperienced in arbitration, put arbitration clauses into contracts that, among other choices, choose the ICC as case administrator versus ad hoc arbitration under CPR or UNCITRAL rules.²⁴⁴ Arnold recognizes the Terms of Reference procedure as a quality control measure and states that it is theoretically very important and very helpful, but that practically this is not so in the great majority of cases.²⁴⁵ Arnold suggests that this procedure may even be more expensive and time consuming than the value added by this step.²⁴⁶

Although review of the award for quality control purposes is desirable, it is costly in time and in money.²⁴⁷ Arnold describes why this is particularly so when the award is returned for revision to three arbitrators from different countries after the first submission: "They are likely then off on new frolics, have forgotten much of the evidence, and tend to be both slow and substantively not excellent in the award revision work."²⁴⁸

Arnold suggests that if one has experienced arbitrators, the award revision is not cost effective on average, but if the arbitrators are new and inexperienced, award revision is cost effective on average.²⁴⁹ Thus, in light of the ICC's emphasis on experienced arbitrators from around the world, the chances that this review procedure will add value is questionable. The value of the step is further questionable because in the large number of countries that are signatories to the New York Convention, the same defenses to an arbitral award are available.²⁵⁰ Thus, if experienced arbitrators are used in either the ICAC or the SCC Institute, it should be rather predictable and easy to avoid

243. *Id.*

244. "[I]n big-buck complex cases [there is] perhaps one-in-four risk of . . . [a] horror stor[y] of several years of time and millions of dollars." See Arnold, *supra* note 38, at 104 (citing *Pilkington v. PPG*, a case that was in arbitration seven and a half years and that resulted in arbitration fees of \$24 million, attorneys' fees of \$37.5 million, and an award on the merits of \$7.5 million; also citing *Intel v. AMD*, in which a six- to eight-week total for arbitration was agreed to, but it lasted four and a half years, and was then appealed in the courts for approximately two and a half years).

245. *Id.* at 107.

246. *Id.*

247. *Id.* at 108.

248. *Id.*

249. *Id.*

250. The defenses are: invalidity of the arbitration agreement or incapacity of a party under applicable law; lack of fair notice or inability of a party to present his case; an award outside the scope of the submission to arbitrate; composition of the arbitral tribunal that is not within the agreement of the parties; an award that has not yet become binding; subject matter of the dispute not falling within the category of those able to be settled by arbitration under the law; or the recognition or enforcement of the award would be contrary to the public policy of that country. New York Convention, *supra* note 158, art. 5.

the overturning of an arbitral award without the extra step that may cost time and money in the ICC.

As discussed above, the number of arbitrators can also have an impact on the cost of the arbitration.²⁵¹ Recall the following quote from the ICC: "Particularly when the amount in dispute is small, the designation of more than one arbitrator can increase quite considerably, and unreasonably, the cost of an arbitration and also delay the prosecution of the case."²⁵² This is certainly true, but Arnold also points out that even in moderately complex cases the use of three arbitrators means more than merely three times the cost of an arbitrator's fee, and "in a complex international case with a necessarily long reasoned award, three are extremely, shockingly, less efficient than one. . . . The total cost with three arbitrators may well be 10 times greater in money and 12 or 15 months longer in time than with one arbitrator."²⁵³ Of course, as Arnold notes, there are advantages to using three arbitrators, but the potential disadvantages must also be taken into account when making the decision, and one of those is added cost.²⁵⁴ Therefore, this default rule to one arbitrator could work to the cost and time benefit of parties that fail to choose the number of arbitrators, whereas the choice of three arbitrators in a complicated dispute may not always be the wiser choice.

Another potential disadvantage of arbitration in the ICC is the method by which arbitrator's fees are set in part by the complexity of the case.²⁵⁵ This may cause the arbitrators to portray the case as more complex and cause them to be less time sensitive in order to perfect the reasoning of the award.²⁵⁶ Arnold advises providing for either a naked award or for a 1,500-word or five-page limit on reasons to remedy this problem.²⁵⁷

Lastly, it is important when considering the ICC (or any other forum) to question the amount of investment one is willing to put into an arbitral process

251. Arnold, *supra* note 38.

252. The ICC Int'l Court of Arb. 7 (June 1994).

253. Arnold, *supra* note 38, at 110.

254. Some of the advantages that Arnold notes are that a panel of three is capable of supplying a better balance of expertise than a single arbitrator, and the judgment of a panel of three is arguably of higher quality due to the debates and interactions between the arbitrators. *Id.* at 109. In addition, Arnold states that the judgment of a panel of three may stifle eccentricities that might be present in the judgment of an individual neutral. *Id.* at 112. "However, to make the best choice possible regarding the number of arbitrators, parties should also be aware of the advantages of using one or two arbitrators and the disadvantages of using three." *Id.* at 109.

255. *Id.* at 119.

256. Arnold provides the following example:

[T]he arbitrators are inclined to write on all of the issues submitted to them so that the ICC, which sets the fees, will know how complex the case was and will set the fee accordingly. Further, most careful arbitrators inherently want to write their reasons in detail to justify themselves to the losing party and show how careful they were. . . . And the parties get to pay for all that writing and polishing.

Id.

257. *Id.* at 118, 120.

and to question if the amount spent is worth the extra quality safeguards the ICC provides.²⁵⁸

V. Choosing a Forum

So each discussed forum has its advantages and disadvantages, but the question remains as to which forum is preferable for parties to a Russian contract. Before making such a decision, the parties must first determine what their goal of arbitration is, other than the pure resolution of the dispute. One view is that parties to international transactions choose to arbitrate not because arbitration is simpler than litigation, cheaper, final and binding, and largely nonreviewable, or because arbitrators have more expertise than national judges, but because neither wishes to subject its rights and obligations to determination by the courts of the other's nationality.²⁵⁹ In other words, impartiality and neutrality. Of course, issues of cost, simplicity, and time are undoubtedly factors in one's decision as to a forum for arbitration, as these are often the strengths of arbitration over traditional litigation.²⁶⁰

The question then is whether the Russian fora (the Arbitrazh Courts and the CCI/ICAC), in comparison with more traditional Western fora (the SCC Institute and the ICC), offer enough impartiality as well as ability for review and quality control, while at the same time offering a relatively convenient forum with relative cost benefits, to make them an attractive forum for dispute resolution. Generally, a decision on forum may depend on the following: (1) complexity of the commercial relationship; (2) location of the parties and primary business activity; (3) location of parties' assets; (4) reputation and local influence of the Russian party; (5) number of potential parties to an arbitration; (6) languages of communication of the parties; and (7) nature of the contract of potential dispute.

When taking the above factors into consideration, it is important to keep in mind the effect the choice will have on the parties in terms of cost and potential burden, as well as any disadvantages in terms of impartiality.²⁶¹ The more complex and involved the case, the more potential there is for increased costs, and thus the greater the desire to ensure impartiality, neutrality, and quality control. Indeed, it

258. Van den Hoven, *supra* note 215, at 43. Frans van den Hoven likens the principle in financial management (that the amount of investment should lead to a fair return on the capital spent) to international arbitration. *Id.* "[I]nvesting in arbitration means investing in trust. . . . The more trust we have in those called to settle our disputes, the greater the chance that we have made a sound investment." *Id.* Van den Hoven says that the investment can be measured if the balance between the risk to be incurred and the money to be spent is positive. *Id.* The risk is that of "an unbalanced and hence unjust decision or award which fails to meet the needs of international trade." *Id.*

259. Charles N. Brower, *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY*, *supra* note 161, at intro. ix, x.

260. Fischer and Haydock, *supra* note 29, at 948.

261. For example, choice of a language that will require minimal translation and interpretation costs and that will not prejudice and choice of a convenient forum so as to reduce travel and lodging costs and to provide for neutral territory.

is fair to say that the more complex and involved the potential dispute is, the less likely Russian Arbitrazh Courts will be the best forum, due to their lack of experience and potential for being improperly influenced.²⁶² However, the CCI/ICAC appears to offer an adequate alternative for parties that wish for the arbitration to remain in Russia.²⁶³ It is equally fair to say that neutral, quality awards are almost certain to result from the SCC Institute and the ICC, but at perhaps a cost in terms of expense and time.²⁶⁴

VI. Arbitration Clauses

Since there are an infinite number of possible factual scenarios surrounding contracts with Russian parties, many of the concerns over excessive cost and time involved in arbitration (in any arbitration forum) can be met through the prudent drafting of arbitration clauses.²⁶⁵

Some key areas to address in an international commercial arbitration clause are: (1) scope of dispute; (2) type of dispute; (3) validity of arbitration clause and agreement; (4) applicable rules; (5) place of arbitration; (6) number of arbitrators and method of selection; (7) language of arbitration proceedings; (8) timing of claims; and (9) choice of law.²⁶⁶ As suggested by Arnold, there should also be an expedite/case management clause.²⁶⁷ If the parties do choose the arbitration rules of a particular forum, they should cross-reference those rules with their drafted arbitration clause to avoid any inconsistencies.²⁶⁸

A final point to keep in mind when drafting an arbitration clause involving arbitration in Russia is that the parties should be careful about using the term "arbitration."²⁶⁹ As noted, the term "arbitration" may refer to either the process under the judicial arbitrazh courts or to the process of arbitration in the CCI.²⁷⁰

262. Zinger, *supra* note 6.

263. See Hendrix, *supra* note 11, at 10.

264. Alley, *supra* note 182; Franz van den Hoven, *supra* note 214; Arnold, *supra* note 38.

265. The failure to spend the time to draft a thoughtful arbitration clause seems to be the cause of many problems that arise in the arbitration process: This is not the first case with which I have had to deal where the arbitration clause has left something to be desired. Many contract drafters seem to have difficulty in the fairly simple task of drafting an arbitration clause or even replicating a standard form arbitration clause. Arbitral institutions and associations go to the trouble of drafting standard form clauses and disseminating them for the benefit of users, yet in far too high a percentage of cases something goes wrong.

Fischer and Haydock, *supra* note 29, at 974 (quoting a judge in *Lucky-Goldstar Int'l v. Ng Moo Kee Eng'g Ltd.*, [1993] 2 HKLR 73).

266. *Id.* at 962.

267. Arnold, *supra* note 38, at 113.

268. "[I]t is prudent to cross reference the drafted clause with the rules to avoid redundancy, or even worse, inconsistency, uncertainty, or inoperability. . . . These traits are the hallmarks of defective international commercial arbitration clauses." Fischer and Haydock, *supra* note 29, at 968.

269. A.S. Komarov, *International Commercial Arbitration in Russia as a Way of Settlement of Foreign Trade Disputes*, RGL/IPG LAW, Vol. 1, No. 5, 1994, at 28.

270. *Russia Overhauls System*, *supra* note 11, at 174.

Thus, a clause that simply states that “disputes shall be considered by an arbitration court” will require an additional specification by the parties or there will need to be a finding on what the parties’ intent was.²⁷¹ If the parties intend to engage in traditional arbitration (ad hoc or institutional), they should explicitly state such to avoid an interpretation that they intended their disputes to be litigated in the Russian judicial arbitrazh courts.²⁷²

VII. Conclusion

Although there is not a clear-cut preference for a particular forum, what is clear is that many costs, delays, and other negatives can be dealt with by understanding the problems facing Russian society and by drafting smart arbitration clauses to ameliorate those problems.²⁷³ Russia has made some substantial improvements in the area of international arbitration that make it increasingly more sensible as an arbitration alternative given the right set of circumstances.²⁷⁴ Indeed, for disputes involving Russian parties, with assets located in Russia, the Arbitrazh Court or the ICAC may be preferable to arbitration in the SCC Institute or the ICC.

In the short term, however, it appears that for the more complex international commercial relationships having large sums of money at stake, parties may prefer the SCC Institute or the ICC over the Russian Arbitrazh Courts and the CCI/ICAC to ensure greater impartiality and quality of process. It remains to be seen if either of the Russian alternatives will develop a higher level of expertise in commercial disputes necessary to gain the trust of parties to engage in an impartial resolution of complex, high-stake international commercial disputes.

271. Komarov, *supra* note 270.

272. *Id.*

273. See Nikiforov, *supra* note 6; Arnold, *supra* note 38; Hendrix, *supra* note 11.

274. See Keeva, *supra* note 5; Koman, *supra* note 5; Zinger, *supra* note 6.