

тель, оплативший и получивший акции, если стоящая за ними рыночная стоимость активов окажется меньше обусловленной, например, во МКАС, и по российскому праву или по иностранному праву, останется для него неясным, он предпочтет выбор иностранного арбитража, где защиту предоставляют.

Дамы и господа, я попытался дать пример нереализованного потенциала МКАС, заключающегося в способности раньше других судов РФ отвечать на актуальные вопросы правового регулирования, двигать практику и теорию применительно к текущим потребностям крупных международных инвесторов, пока государственные суды размышляют и накапливают материал, а законодатель думает, какие новые законы для лучшего урегулирования назревших вопросов следует принять.

На этом позвольте завершить свое выступление.

Благодарю за внимание.

ICAC and the Legal Services Market in Russia **Address at a conference “International commercial arbitration:** **actual problems and solutions” marking the 75th anniversary** **of ICAC at the Chamber of Commerce and Industry of the** **Russian Federation October 26, 2007**

*Yuri E. Monastyrsky**

Historical Role of ICAC

Ladies and gentlemen,

Members of legal practices and law firms, we advise business people, prepare and present legal positions on their behalf, recommend the wordings of arbitration clauses, and weigh up chances for and in legal proceedings.

It is with the highest respect that all of us treat the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, and it is thus a great honor for me to speak at this anniversary conference.

The Court's arbitrators are well-known Russian scholars. Some have taught us the ABC of jurisprudence, got us carried away by their incredibly

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thrilling lectures, and played the decisive part in our choice of the vocation to pursue. We still enjoy the invaluable assistance they offer during direct meetings at scientific get-togethers or through their profound, to-the-point books and articles that we turn to in our research.

By its status, authority, and influence, ICAC holds a pride of place amid the arbitral tribunals dealing with commercial disputes, because it is capable, like indeed no other court, of implementing the most advanced standards in the resolution of commercial conflicts.

The vast majority of parties submitting themselves to arbitration in Russia under the international commercial arbitration law cause their respective contracts to include a clause on ICAC. Statistics testify that the Court takes up hundreds of cases annually, while the vast number of other arbitral tribunals whose rules put them in a position to be able to do so as well under the international commercial arbitration law only each considers, at best, a few dozen. Figuratively speaking, ICAC must be compared not with those courts, but only with the larger international arbitral centers and it carries enough weight and regional credence to stand out as one of the world's major arbitration venues.

It has a huge and often crucial role to play in developing the legal services market in Russia. Truly enough, legal services do not boil down to the settlement of disputes alone, but the market cannot operate in a full-blooded manner without an adequate enforcement system, because otherwise, the results of legal backing for business transactions are going to be left exposed, vulnerable and thus uncalled for by the clients.

Recommendations

The professional appeal of an authoritative court rests on the following three principles:

1) efficient support for proceedings, for which the secretariat, reporters, and others are responsible;

2) the standing and business qualities of each and all of the arbitrators. They constitute a professional community of their own, which itself works out its unwritten standards for due performance and estranges those who depart from them to the detriment of the reputation of the court; and

3) last but not least, the ability to protect the clients' reliance on what they see as critically important – the sophisticated legal machinery so challenging that state courts may find them too intricate.

It is the opinion of many that ICAC has been steadily improving its work. The approval of its new rules, which include some very timely innovation, has come as a veritable stride along the route. Among other welcome developments, the Secretariat and the Presidium have been given a bigger role with the arbitrators, including, but not limited to, more stringent formal requirements for the execution of awards and the observance of deadlines. It is truly said that for ICAC, an award is an end product rather than a discretionary presentation of legal conclusions on knotty issues. The award is to be enforced and to be enforceable, without any inherent impediment to its own fulfillment.

There is, however, a small problem that I would like to raise and that can and should be discussed here. Voices have been heard about the arbitrators lacking certain powers during a hearing “ideally to be based on the contestant parties’ mutual trust and respect for the arbitral tribunal” where some members of the Bar engage in “obstructionist tactics aimed at setting up formal impediments to proceedings” or in such other trickery and wiles as are barely compatible with a lawyer’s ethics. The solution offered as a way of stemming such malpractices is that professional and legal communities should work to foster an above-board litigating culture.

As I see it, the right to urge the devious element amongst our ranks to order and apply disqualifying restraints to it, belongs to the arbitrators.

Even though they are not authorized, for example, to order a member of the legal profession out of the courtroom or have them fined, the arbitrators still have their leverage against reprobates. What I have in mind is that arbitration allows a great deal of evidence and leaves the arbitrators a greater freedom of action in arranging the hierarchy of proof than is possible in a state court. So by posing continued questions and challenges to the party that makes a doubtful case, the arbitrators can well call the bluff where tricksters attempt any cheating or double dealing or what they could falsify – and that would absolutely be the right thing to do. At an adversarial trial, the arbitrators are to make progress by drawing a series of consecutive presumptions such as that a specific assertion is false or that a suspicious line has been added to a balance sheet already after the fact.

Since the arbitrators have no means of compulsion, they have all the more reason to tread the line of making for the good-faith exercise of procedural rights, as provided for in the international commercial arbitration law. Failing to do so detracts from the prestige of the arbitral process, does a dis-

service to the bona-fide parties, and devalues the legal consultants' assessment of the duration and outcome of proceedings.

In most cases, bad faith is easy to perceive, yet hard to expose. However, if the situation is attained where the parties will be wary (as they now are at Western arbitral venues) of merely falling out with the arbitrators, the problem will dispose of itself.

Ladies and gentlemen,

Let me conclude with another important wish. In its regulation of commercial operations, ICAC should be a flagship of Russian law enforcement bodies. ICAC was always known for its specialization in foreign trade disputes. Whereas previously most asset flows were those across the borders, it is ambitious investment projects involving Russian assets that form the core of business – and related disputes – nowadays. Most of these transactions are tailored to be subject to foreign laws and in the event of a stand-off between the partners, they take the quarrel to the competent foreign arbitral tribunal. There is, of course, nothing wrong about the parties opting to subordinate their conflicts to foreign laws and foreign arbitration (although we, Russian legal practitioners, are certainly left to rue, as the work slips away to foreign colleagues). What is to be serious about, however, is that the Russian law in the crucial matters has tended to stall rather than making headway.

The situation in evidence also betrays a certain failure by ICAC to promote its image as a refereeing body that has the expertise to come to grips with the hardest and trickiest of legal cases. I have mentioned an arbitration court's ability to defend the legal product documenting various transactions (for example, business sales and purchases) as one of the indispensable ingredients of its clout and attractiveness. We are all aware that the chapter the Russian Civil Code has on the sale of business undertakings has proved barren. The options that it leaves open for structuring any such sell-off make it a risky and irrational proposition, which is why this kind of wheeling and dealing goes through the transfer of shareholdings in the companies that own factories and like producing ventures or service entities via cross equity participation. The question is, however, if a good-faith buyer having paid for and obtained its shares will be duly protected, for example, at ICAC if the buyer's market asset value turns out smaller than required and whether the problem will be resolved on the basis of Russian or foreign laws. With the clients as yet uncertain of the answer, they pre-

fer to submit themselves to foreign arbitration with its assured protection for such relief seekers.

Ladies and gentlemen, I have attempted to give an example of the as yet untapped potential of ICAC to the extent concerning the ability to provide responses to the arising urgent issues of legal regulation before any other court in the Russian Federation, and the capacity to update the applicable theories and practices with a view to taking care of the current needs of international investors at a time when the state courts are only accumulating and thinking over relevant precedents and the legislators are taking their time as they contemplate the new laws required to fill the existing regulatory gaps.

This is all I have wanted to share with you in this brief address.

Thank you for your attention.