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ARBITRATION REFORM IN RUSSIA: THE FINAL STAGE?

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IMPORTANCE OF THE ARBITRATION REFORM FOR THE LEGAL SERVICES MARKET

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Dear participants,

I would like to share with you my perceptions of the arbitration reform. These perceptions are based on the views expressed by the legal practitioners specialising in dispute resolution rather than by the academic part of our arbitration community or arbitrators. While the latter's recommendations are motivated by considerations of the freedom of arbitration procedures, the existence of interesting cases and the results of their work, the former ask themselves how a system of arbitration centres should look like in general and how those centres should function to create a friendlier legal environment and provide better support to their clients in legal disputes.

We can bring up that question in a different way: What key drawbacks of arbitration courts are to be eliminated, based on the past experience, in order to attain what was really missing – a healthy competition among arbitration centres, high quality of judges, specialisation of arbitration courts, independence of arbitrators in terms that they should not be prone to any organisational or other influences from their superior colleagues, consistency of arbitral awards, and flexibility in dispute resolution? Please excuse me for being probably somewhat eccentric, but I believe that the arbitration reform should be aimed at reaching the following goals if we really want the aforementioned missing elements to eventually appear.

First of all, we need to create a self-regulatory arbitration community that will bring together specialists in accordance with the principles of honesty and professionalism and establish a natural census for arbitrators based on the existing pro-forma model for lawyers and auditors. This should be an even more closed community as law-enforcement services require certain qualifications in law making – a requirement that is not usually imposed on other self-regulatory communities of law experts. All of the other candidates, who are not the members of such closed community, can provide reconciliation services where high qualifications in law are often not required and a level of an industry expert would suffice.

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The lists of court arbitrators should only be compiled from among the members of the arbitration community and should be closed as the Russian arbitration community, which is just emerging, still lacks any public opinion factor to discipline arbitrators. Since the professional sphere is dominated by group interests that can considerably affect the arbitrators' impartiality, the task of exercising an elegant control over the candidates should be met by analysing their fitness for being put on the list of court members. Such lists will also help each arbitration court find its identity and occupy its own competitive niche. Arbitration centres will establish their own practices and take innovative approaches to protecting complicated commercial schemes used by quickly developing businesses. And it is still more important that such closed lists would perfectly motivate the most reputed arbitrators to become members of those arbitration courts that meet their professional expectations and have already attracted a circle of like-minded people rather than to join as many arbitration courts as they can just to be on the safe side. Only closed lists will create a healthy competitive environment among arbitration centres. Otherwise, they will only compete by their level of technology and self-advertisement. Closed lists will form a basis for competition on the market for arbitration services or at least on that for arbitral assistance related to dispute resolution.

However, competition requires two more components. The first one is specialisation of some arbitration centres, i.e., if you like, their specific legal capacity. The general legal capacity of all and any arbitration courts is a travesty of the idea of arbitration reform and a civilised arbitration community. Why such specialisation is necessary? Because it will help arbitration centres promptly take their particular competitive positions on the market for arbitral assistance related to dispute resolution. The closed lists will prevent experts from migrating and, consequently, certain arbitration centres will be able to focus on the specific matters of protection of litigants' rights and interests. These matters would mainly involve industry-specific law problems, such as banking, energy, etc., as well as those concerning business co-owners carrying out economic but not business activities, etc. In other jurisdictions with a small number of arbitration centres, there are sector-specific arbitral courts specialising in stock trading, trading in metals and crude oil, etc., and they are becoming increasingly popular. That's because in a healthy competitive environment such centres focusing on particular disputes have managed to get a permanent clientele who trust them and fund their activities by paying arbitration fees.

The idea of specialisation is also based on the dualistic system of arbitration regulation where the procedures of international commercial arbitration should considerably differ from those applied by domestic arbitration courts if the wordings of the base laws governing their activities coincide. While international commercial arbitration resolves disputes in the area of international economic relations, its key distinctive feature is that it must not be bound by any law-enforcement principles in the court system where it is functioning as a separate institution. The point is that international commercial arbitration is mainly governed by international conventions, which, due to the need to apply them consistently, prescribe judges to resolve complex cases in accordance not only with the established practices of a certain court but also with the manner in which particular law institutions function and particular conventions are applied elsewhere.

Another example of the aforementioned difference is provided by the fact that international commercial arbitral awards will not be enforced when public order is disrupted and domestic arbitral awards will not be enforced when the applicable principles of law are not observed. These are two different categories of law. While public order protects against alien legal influence and disagrees with the law-enforcement effect based on foreign laws, the principles of law constitute a broader concept pertaining to the interpretation of domestic law.

Another necessary factor of a healthy competition is the status of arbitration centres themselves. All of them must be legal entities. For as long as a legal entity exists within a market environment, it will go bankrupt and wind up once it has no job or business. When an arbitration centre acts as a small office funded by a larger entity, not only will it lose its independence and find itself to be outside of the market, but it will also get the competitive advantage of sustainability. It is a functioning element of the arbitration system that has no traditions and is very likely to become a puppet arbitration court – an effect that needs to be eliminated during the upcoming arbitration reform.

In our opinion, another necessary incentive to make the system of arbitration courts or centres healthier is the relationship between arbitration courts as institutions that are said to provide and administer proceedings, on the one part, and arbitrators, a panel of arbitrators, on the other part. Such relationships must be governed by law in a way similar to mass media rather than to joint stock companies or even non-profit organisations whose founders, shareholders or members still have some influence on arbitrators. That organisational influence is a factor that affects impartiality because such system can be open and corrupt by bribery to some extent, and sometimes impartiality may simply depend on a person's fear, which may be even sub-conscious, of offending someone or doing something that would result in other people beginning to think hard things of that person. This problem always arises where an organisational hierarchy and an economical dependence exist. Being a member of a self-regulatory arbitration community, an arbitrator could work for an arbitration centre under a contract. And then he or she could say: "If you continue exerting pressure upon me, I will leave for another arbitration centre and you will lose your revenue."

While a need for some obvious legislative amendments has been existing for dozens of years, those amendments are rarely spoken about for some reason. From the point of view of a practising lawyer, the primary task of the arbitration reform is to attract major disputes. The existing practice proves – and it is now evident to everybody – that such major disputes always involve corporate litigations among owners of major industrial and financial empires and other well-off business people, as they usually pertain to most complex, intricate and, probably, interesting cases and multibillion claims. However, our laws still lack a clear and express statement of whether individuals having no entrepreneurial status can recourse to international commercial arbitration procedures in the Russian Federation. What actually prevents such statement from being clearly made is a confusion of notions. International commercial arbitration must resolve business-related disputes. But such disputes often arise among business people with no entrepreneurial status.

Clarify the definition of the term "business activities" as a narrower notion that suggests an activity and an active participation therein and make it clear that international commercial arbitrations are authorised to resolve any and all economic disputes, including those arising among individuals. If you do that, you will discover a new opportunity to attract a range of new interesting massive cases that will strengthen the existing arbitration practices and provide some valuable materials for further legal research.

Thank you for your attention.