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GETTING ASSISTANCE FROM STATE COURTS IN M&A DISPUTES

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First of all, I would like to thank the RAA for an opportunity to discuss what appears to be the most interesting current problem in relation to the assistance of state courts in M&A disputes arising between the sellers and the purchasers of a business. The topic implies that such a commercial conflict will be submitted to arbitration rather than a court of law, because the assistance of the court in the latter instance will be to resolve the matter in a just and professional manner. Enforcing the order or taking interim measures could assist a foreign court. The Russian Code of Arbitration Procedure allows both. However, assistance to arbitration constitutes a much more substantial problem.

This issue has its own history, indeed. At the very outset, court assistance was usually limited to the following measures: offering the parties to resort to an arbitration procedure, deposition of tribunal awards and ordering their enforcement. Today the key aspect of assistance is an express waiver of jurisdiction if any of the parties to an arbitration case makes a claim to a court of law. The effect is that it is not required to confirm the parties' agreement to arbitrate their conflict. The agreement binds its parties. It is stated in the New York Convention, which established that most important method of assistance. Its literal content in all UN languages is that the court must waive its jurisdiction if it has received a claim covered by an agreement to arbitrate. In doing so, it should also assess the arbitration clause. Our courts sometimes construe its defects wider than their foreign colleagues do. For instance, they believe that such a clause may, despite being autonomous, be examined for defects of will.

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Another measure of assistance is support for interim measures, which may be taken by arbitration tribunals. Despite a number of positive examples, this institution does not work properly in the Russian Federation, although an appropriate legal framework for it does exist. According to the published concept of reform, interim measures of an arbitration tribunal will not be made enforceable. Without that tool, the arbitration procedure would be largely devalued.

As a final support for a completed arbitration proceeding, the courts will also order to enforce the award without reviewing its merits, having examined, first, the procedural circumstances of the dispute's hearing by the tribunal and, second, the scope of the arbitration clause, arbitrability and compliance with public policy. The New York Convention contains a very narrow language regarding non-arbitrability: "If the subject matter of the dispute may not be settled by arbitration". However, it is still not refuted that any matters affecting third party rights and containing a significant public element are non-arbitrable, and those matters are mainly those relating to corporate and investment disputes, and – that is fatal for M&A deals – sometimes also disputes arising from share sale and purchase transactions, which constitute an essential component of M&A contract structuring. A breach of public policy or principles of law will be construed in an extremely broad manner. In certain cases, however, supreme courts have issued pro-arbitration orders.

What is the main problem here? Why are the courts reluctant to interact with arbitration in a more effective manner? That results from the specific features of our judicial system, the place and role of arbitration tribunals. State courts are intended to resolve a great number of minor disputes. Arbitration courts are and, apparently, will be doing the same. Their social roles are not separated. If you raise the duty or fee with respect to civil cases, the situation will change very quickly. We do not see that the Ministry of Justice, entrusted with the implementation of the arbitration reform concept, supports the idea and intentions, which would help arbitration proceedings.

According to the concept of the reform, uniform standards of procedure should apply to domestic tribunals and international commercial arbitration. However, in order to optimise interaction between the courts and the arbitration tribunals, it appears to be vital to strengthen the role of international commercial arbitration and to separate it from common domestic arbitration proceedings. This appears to be the right legal solution for the purpose of developing a working legal framework for all arbitration tribunals. International commercial arbitration is primarily governed by international conventions, such as the New York and Geneva ones. Those are universally applicable documents. Arbitrators and state judges should take into account practice and doctrinal judgements in other countries. A common arbitration procedure is only governed by domestic law.

There also exist not so crucial but still significant procedural differences. An arbitration tribunal's chairman cannot be a foreign national without Russian legal education. An international arbitrator can be such a person. International arbitrators may use any conflict-of-law system that they believe to be applicable. A domestic tribunal may only apply national law. And, finally, the most fundamental professional difference is that an international arbitrator is

not only entitled but also obliged not to be guided by any substantive findings of state courts with respect to particular matters. Domestic tribunals cannot or, to be more precise, should not follow them due to the principle of legal unambiguity and for the purpose of uniform application of national legal rules. The confusion or convergence of these two branches of the arbitration system is quite undesirable.

According to the doctrine of arbitration reform, people without legal education may serve as arbitrators. It would be better, however, if being an arbitrator required an academic degree in law. It is unclear how a non-lawyer could do justice. Arbitrators hearing industry-specific disputes can, in order to understand special matters and obtain special knowledge, employ experts and then enclose all matters of fact in a legal envelope. It is unclear why the institution of jury should be introduced into the arbitration procedure on a *de facto* basis. That will hardly work as expected, especially in the Russian Federation.

According to the concept proposed by the Ministry of Justice, arbitration centres, unless they have set limits to their own jurisdiction, will have quite universal jurisdiction and hear disputes of any kind. It seems to me that a workable arbitration system would be different: a small number of large arbitration centres capable of operating under the Law on International Commercial Arbitration, other domestic courts having universal jurisdiction, and a large number of various special tribunals offering their services to a specific limited clientele. It appears that little-known tribunals and arbitrators of obscure origin would be discrediting both the reform and the entire arbitration system in the Russian Federation by a tremendous number of incompetent awards. As a result, mistrust and stringent court control over arbitral awards, including those related to M&A deals, will be preserved. Court assistance to arbitration proceedings will be kept at a minimum level.