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Key points of speech
"International Commercial Arbitration in the Russian Federation: peculiarities of its status and procedure"

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International commercial arbitration is based on a procedure which is different from the ordinarily used one in arbitration tribunals, on different principles and regulations. The purpose of domestic arbitration courts is to free up state courts, to propagate additional options of civilized commercial conflict settlement. International commercial arbitration has a special function of its own – to promote international business, protect respective relations and large investments of capital, not only of foreign origin but all investments of capital, naturally, associated with the circulation of financial resources among nations.

I. Benefits of international commercial arbitration

This is where some of the status privileges of this institution stem from — and cross-border enforceability of its awards, discretion in choosing the forum and language of litigation are not the key ones. Freedom to apply not only foreign law, but also selected norms and customs — this is what constitutes the very essence and importance of this legal tool. When adjudicating a dispute governed by a foreign law, a Russian commercial arbitration court, by virtue of Clause 1 of Article 1191 of the Russian Civil Code, is to apply it in accordance with the civil law theories predominant in the respective foreign state. Whereas when interpreting domestic legislation, arbitrators are free to take guidance from their own doctrinal understanding. Knowing this, legal advisers of large companies may file claims and obtain protection of such operations that appear to be too complicated, obscure and unknown to the overloaded state courts. Example.

Hence is the main purpose of international commercial arbitration — to settle complex disputes, to deliver such awards that would further the development of legal theory, and give the clients a grasp of what is allowed and what is not.

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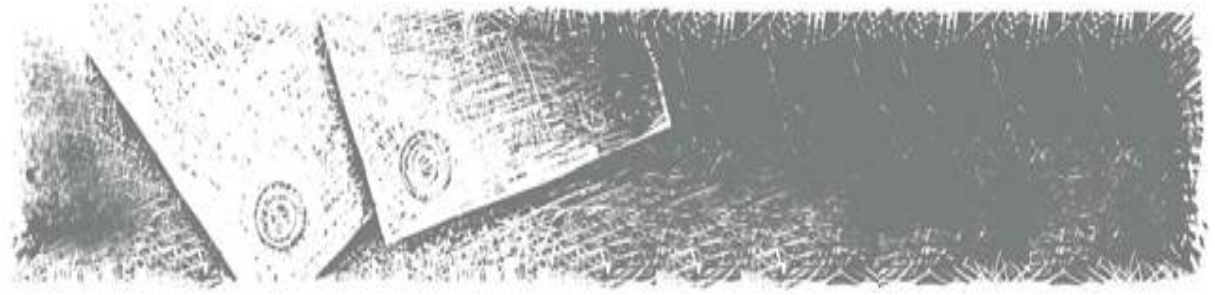
Employment of the respective mechanisms in support of this specified function of arbitration originating from international treaties and model laws is provided. For example, an agreement to choose it as a competent authority will have irrevocable and derogatory effects. The 1958 and 1961 conventions oblige state courts to renounce their competence and promote resort to commercial arbitration, as well as oblige specialized agencies to get involved in the nomination of arbitrators. Ordinary arbitration tribunals can get bogged down halfway up to an actual hearing due to the defendant's effortless attitude in forming a panel.

II. Requirements to the formation of a panel of international commercial arbitration

Ordinary lawyers or individuals may not act as arbitrators in international arbitration proceedings. Arbitration centres must have their own private lists of arbitrators which are not of open access, with a possibility to introduce membership modifications. It is necessary that the number of international arbitration tribunals corresponds to the number of people who, by their education, skills, background and even moral values, are capable of resolving a large dispute. The cases must be predominantly of a complicated nature, which would be regulated through high arbitration fees and, derivatively, considerable compensations for arbitrators, which is quite natural because they render legal services of a peculiar nature that require multidiscipline background and even certain professional talent. Examples of developed countries.

The number of arbitration centres could be regulated by the market. If they are attached to organizations responsible for approving the lists, this would be a cynical and gross violation of their independence offering a possibility to use those authorities as instruments to fight corporate conflicts. All the arbitration tribunals, as providers of services that are subject to clients' evaluation, must be separate legal entities. Specialized arbitration tribunals with arbitrators of non-legal professions, industry-specific tribunals under holding companies not capable of hearing cases under the law on international commercial arbitration, are subject to judicial control in the area of law enforcement.



III. Peculiarities in Russia

In Russia, international commercial arbitration is governed in a very peculiar way, which has attached great singularity to the development and role of respective regulations. In Russia, the international commercial arbitration procedure can be used by any arbitration tribunal divested of the rights incidental to a legal entity. According to the *Arbitration* journal, Russia has more than 1000 of such tribunals. Here are a few of them: “Akademiya zhilya”, “List consulting group”, “Irkutskdolgnadzor”, “Novation”, “Agency for defense of violated rights”, “Sluzhba zakazchika”, Arbitration Court at the Moscow Attorneys’ Collegium, Arbitration Court at Almaz Brill Ekspo and others. Awards of these bodies authorities granted under the international commercial arbitration procedure are not to be reconsidered on the merits and are subject to enforcement abroad.

What is yielded by such institutions could not but prompt especially stringent legal approaches of judicial control in relation to awards granted under the procedure established in the Law on international commercial arbitration, primarily associated with the application of the public order doctrine. Albeit it should be used as an exception and on extremely rare occasions. Additionally, quite a wide spreading has been shown by unusual interpretations of objective non-arbitrability when whole categories of cases — for example, corporate disputes — are *a priori* declared to be beyond the competence of arbitration tribunals. This *a priori* attitude in determining non-arbitrability robs Russian arbitration tribunals of one of important avenues for development, hinders protection of complex corporate relations. The theory of affecting third party rights and public interests is put in action in any dispute before it actually arises. However this “affect and prejudice rights” slogan, this absolutely non-legal wording is insidiously sly. Contract relations in the corporate sphere are of private concernment. They may not and do not put third parties into any commercial inconvenience, and in no way may impose whatever obligations on third parties. Rights are probable to get affected in one case – when somebody’s property diminishes.

The institution of international commercial arbitration does not have any chances to develop normally as long as business is forced to leave Russian judicial as well as legislative jurisdiction due to the fact that all the same corporate disputes involving a foreign element can be considered by foreign arbitration tribunals. Indeed, this is a great paradox, if not malignance. Corporate disputes before foreign courts are arbitrable, while in Russia they are not. They discuss the underdeveloped and rigid character of Russian law, design and offer a systemic revision and believe that this will bring claims for enforcement of company stakeholders’ rights back to the fold of state courts whose legal aspirations and internal flows are unclear to us. An arbitrator of repute is a professional who can be openly criticized. A judge is someone beyond criticism. Justice cannot be pressurized. This temple of purity and integrity may not be trespassed shod-foot. Without protectionism to own law, it is impossible to note improvements in the legal consciousness of individuals, or in the sphere of legal assistance, or in the cause of fighting corruption in the area of dispute resolution.

IV. Some measures to extirpate drawbacks

State courts in the countries with established commercial arbitration standards are interested in the development and aggressive involvement of international commercial arbitration. They consider it as a flagship of administration of law and as a factor working to increase the attractiveness of the national jurisdiction in general and to free up the courts and alleviate the state budget. Often, judges consider commercial arbitrations of high reputation as a future place for professional activities. The support of state jurisdictional bodies lies in taking steps aimed at facilitation, confirmation of competence, etc.

For the time being, Russian state courts are not ready for such stimulus to arbitration. Notably, notwithstanding the *lis alibi pendens* principle they do not hesitate to entertain claims and initiate proceedings in parallel with arbitration, notwithstanding the *res judicata* principle do not shun re-considering cases about invalidity of contracts in which arbitration courts have already adjudicated validity and recovery, etc. The courts do this not least because not only our well-known arbitration centres namely International Commercial Arbitration Court (ICAC) and Maritime Arbitration Commission (MAC) try cases in accordance with the law on international commercial arbitration and the New York convention. Little-known commercial arbitrations lack competence, observance of the principle of more active competitiveness, etc. As a result, an average international commercial arbitration court finds itself at an inadequate level of recognition.

In view of the above, to enhance the role and significance of international commercial arbitration, relevant amendments are to be introduced into the respective law and the Arbitraction Procedure Code of the Russian Federation. For instance, an amendment establishing competence to settle disputes between well-off individuals, who up till now have been preferring London as a forum for litigation. The Supreme Arbitration Court could provide the necessary directives on how to apply the fundamental civil procedure principles of *res judicata* and *lis pendens*. And most importantly, the arbitration tribunals following the international commercial arbitration procedure have to undergo certification to slash their number to a minimum, perhaps one to three in the entire country.