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Importance of the Arbitration Reform

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The arbitration reform is an epochal event for the Russian market of legal services as it will result in the establishment of centres for the rigorous, honest and competent resolution of various disputes, including industry-specific ones. The reform is designed to create favourable conditions for the emergence of such places. All the required grounds have already been laid for it, and an authorisation system for the selection of tribunals has been established. It is expected to create a requisite natural environment for fair competition among those services essentially facilitating dispute settlement – a development that will, first, result in the appearance of large specialised bodies considering a lot of claims on an annual basis and, second, strengthen the positions of the oldest and most authoritative arbitration courts. All those outcomes will contribute to a better protection of complex contractual patterns vital for business people and lead to litigants being more eager and willing to refer their cases, including the largest and most difficult ones, for resolution by Russian tribunals. But what are the drawbacks?

The arbitration reform has emphasized no role, importance or potential of the International Commercial Arbitration, which usually functions separately from the judicial and internal arbitration systems, is not required to submit to them and is expected to provide an individualised, special protection, primarily for foreign investments and investors, despite the fact that courts now tend to interpret some matters in a different way. Let me give you one example. The Russian Supreme Court has just released its new Resolution No. 7 that interprets the rule governing the liability for a failure to meet obligations, which rule is virtually central for dispute resolution. And in that resolution the Supreme Court said that the parties to a contract can exclude in advance any liability for a failure by either party to meet its obligations under such contract if the other party exhibits a gross negligence. The Supreme Court acted absolutely unreasonably and unlawfully while interpreting Article 401.4 of the Russian Civil Code, which deals with wilful default, by using a method of construction from the contrary – an approach that is barely inadmissible in such high-level judicial explanations. Alas, this interpretation may now become a guide to action for all arbitration courts for a long time or at least for a while. Meantime, the International Commercial Arbitration is not required to follow any absurd and anomaly that may find their way in judicial interpretations from time to time – it should go its own way and act on the basis of the applicable international standards and its own individual understanding of legal matters and issues.

Furthermore, the arbitration reform has intentionally laid no ground for the emergence of industry-specific tribunals that are in great demand by the business community. Such tribunals are required in the areas of banking, insurance, metal trading, etc. All those bodies will have a sort of general legal capacity, and only the market can make the arrangements required to induce business people from specific industries to go to specific tribunals with the lapse of time. That process will take many years, while some of the arrangements could have been made well in advance.

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The key goal of the arbitration reform – creation of a self-governed arbitration community – has not yet been set or even discussed. Therefore, there is no ground for pulling lobbyist arbitrators (whose key function is not to resolve disputes based on in-depth knowledge of legal matters but to exert influence on decision-makers based on backstage interests and political prejudice) out of arbitration activities. They will exploit the privileges of today's arbitration such as autonomy and undeniability *ad rem*. That means the opaque arbitrators' motivations will still go without any response and professional discussion in many particular cases in the foreseeable future.