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B2B: Consolidation of the Supreme Courts: Objectives and Potential Consequences

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Case Law Consistency: is it really of value or is this a myth for the masses? Will the supreme court instance work more efficiently? Will businessmen choose state arbitration as a forum for settling disputes or will the LCIA and SCC remain the only option?

The extensive judicial reform poses a great deal of questions that businessmen and the ordinary consumer will have to answer for themselves on a fait-accompli basis. Neither its objectives nor implementation mechanisms have ever been broadly discussed in public. The expert community is puzzled and murmurs quietly, while the State Duma churns out laws just-in-time and without hesitating much.

Transition?

The focus on de-offshorisation announced by the country's leadership is having an increasing effects on various aspects of the country's economy. The initiatives are coming one after the other: reform of arbitration tribunals, special tax status, etc. Among these abundant innovations changing the business rules, it is the reform of the court system that comes to the fore. This is being carried out in pursuit of the principle of case law consistency and an improved image of the Russian jurisdiction for resolving disputes.

At the S.t Petersburg International Legal Forum, Russian President Vladimir Putin said: "Let's think about consolidation of the courts ..." This phrase has aroused great enthusiasm and zeal on the part of some officers, especially lawmakers. Judge for yourself: the core draft law amending the Russian Constitution, abolishing the Supreme Commercial Court of the Russian Federation and causing changes of a number of federal laws was adopted in record-breaking time. For instance, it took the Federal Council only 15 days to approve the law after it was adopted by the State Duma at the first reading, yet it took more than 100 years for the judicial functions of the House of Lords Appeals Committee to be transferred to the British High

Court. Our lawmakers think differently: just recently, we celebrated the twentieth anniversary of commercial justice in Russia and now the Supreme Commercial Court is being abolished. Pursuant to Clause 1, Article 2 of the Law, after 5 August 2014, the Supreme Commercial Court of the Russian Federation, which was previously the final instance of the system of commercial courts, ceases to exist and the judicial matters falling within its competence transfer to the Russian Supreme Court. The professional community is divided into two unequal groups: the first is shocked and perplexed, while the second (substantially smaller) repeats obstinately: "that's it, serves them right". Yet neither the first nor the second clearly understands what is going on.

The explanatory note to the Law says: "The reorganisation of the court system will ensure unified approaches to the administration of justice, with respect to both individuals and legal entities, will exclude any possible denial of judicial protection with respect to a dispute over case jurisdiction, will establish common rules for arranging judicial proceedings and will allow us to achieve consistent judicial practice".

Can this objective be achieved? Is it needed anyway? In our opinion, no, definitely no. Let us provide the arguments.

We start with why different approaches are taken to interpreting the same regulations in courts of general jurisdiction and state arbitration courts.

General jurisdiction courts deal mainly with individuals; as a rule, these are consumer disputes, i.e., a dispute between parties that are economically weak and economically strong. An individual☒ s weakness lies in an unequal negotiating capacity at the start of the agreement and determination of its terms, poor capabilities for exercising control over the fulfilment of obligations by the other party, limited resources for hire judicial representative, etc. All these things require the judge considering a dispute to take a special, paternalistic approach: milder requirements on an individual with respect to standards of proof, redistribution of the burden of proof, naturally perceived procedural activity by the court in "assisting" the party instead of a purely adversarial judicial process, etc. Individuals☒ ignorance about the consequences of actions performed in general jurisdiction courts is offset by statutory limits on their liability, the impossibility of levying execution on certain property and an overall approach aimed at preventing serious consequences for the consumer.

Meanwhile, Russian state arbitration courts consider disputes between businessmen, i.e., economically active persons engaged in risky business aimed at generating a profit. For these people, the supreme value consists in maximum freedom in relation to the terms of their obligations; a Civil Code without any mandatory rules would be ideal for them. Litigating corporations represented by famous law firms least of all need the court☒ s procedural activity; on the contrary, purely adversarial judicial proceedings and an unbiased arbitrator are the best model of judicial proceedings for business.

Yet in the Russian Federation, unlike some other jurisdictions, private relations both between individuals and businessmen are subject to the unified Civil Code. There is neither a commercial nor a business code. This results in inconsistent approaches by general jurisdiction courts and state arbitration courts to interpreting the same regulations: the difference between the entities determines the different approaches to interpreting

the same rules of the Civil Code. According to A.G. Karapetov, the two court systems, each regulating its own range of relations, serve as a tool for delicately adjusting our legislation depending on the parties to these relations.

Now let us answer the following questions: if the different approaches derive objectively from a fundamental difference between the parties, is the aim of the reform, i.e., consistent application of the rules by the two judicial branches, truly achievable? What are the consequences?

Evidently, if we try to develop an average approach and to combine maximum contractual freedom with the abundance of mandatory bans and restrictions in the regulations and if judicial proceedings combine both an adversarial character and procedural activity on the part of the court, such a cocktail will not satisfy either of the parties.

This average approach may appear too complicated for people who are likely to experience a significant increase in requirements, while businessmen, who aim for the most liberal legislation enabling them to frame agreement provisions to their greatest benefit, will be squeezed by additional rules and limitations.

Let us illustrate the practical impossibility of these approaches being brought closer to each other using the example of reimbursement of court representation costs.

The current view of the state arbitration courts on this is that all reasonable representation costs should be duly reimbursed and that no unjustified reduction is allowed.

It has taken some time for this practice to develop and a fundamental role has been played in this by the Presidium of the Supreme Commercial Court of the Russian Federation. In particular, Resolution of the SCC RF Presidium No. 16067/11 of 15 March 2012 might be considered as setting a dividing line in this respect, clearly stipulating the main principles governing reimbursement of representation costs. Prior to this Resolution, representation costs were usually reimbursed in a sum of RUB 30,000.00 to 70,000.00, rising very rarely to RUB 100 thousand. In this case, the reduction in the claimed limit was worded as follows: "the amount claimed for reimbursement is deemed by the Court to be overstated and will be reduced to the amount of...", followed by the amount that is appropriate in the judge s opinion.

The declared sum could be reduced after publication of the Resolution for the following two reasons:

• the hourly rate of any specific expert is inflated in comparison with similar rates on the relevant market;

• too much time has been spent on any specific work.

The next point to be noted is quantitative growth. For instance, there is a court ruling that has recently taken effect allowing compensation for representation costs in excess of USD 1,000,000.00.

Finally, the ultimate level developing the litigation costs compensation issue within the state arbitration court system — the Presidium of the Supreme Commercial Court of the Russian

Federation — agrees that the representatives, who had demonstrated their knowledge of law, judicial practice, scientific doctrines, development trends with respect to regulation of dispute resolution institutions, including in foreign jurisdictions, and international legal trends with respect to any disputable matters, could be paid bonuses. In rendering this verdict, the court took into account the multiple abuses on the part of the opponents and indicated that this payment promoted efficient protection of rights and, eventually, would help develop judicial proceedings in general. In other words, a success fee, even if it is called something else, has been afforded the right to exist.

So, as we can see, this representation cost compensation institution has been consistently and continuously developing within the state arbitration court system and, when engaging a reputable law firm to act for them, parties to a dispute may count on the relevant costs being reimbursed. On the one hand, this approach is intended to reduce the number of cases, since claimants initiating litigation should, inter alia, be aware of the financial consequences of doing so, this reducing the number of so-called technical or parallel proceedings. On the other hand, though, a better paid job is performed better and, if the parties are better prepared, this makes the court's job easier and, eventually, improves the quality of justice.

So how do things stand with courts of general jurisdiction? Alas, their situation is quite the opposite. They continue to give priority to the principle of affordability of justice and, in strict accordance with this principle, award compensation of litigation costs in a range of from RUB 5,000.00 to 15,000.00, with neither the complexity of the case nor the matter disputed influencing the compensation amounts.

In the authors' experience, there was a case in which the Claimants (individuals) demanded a private easement. Had the claim been granted, this would have put an end to an investment project involving construction of a treatment plant on which hundreds of millions of dollars had already been spent. It took 11 court sessions, including a field one, for the first instance to award the claim. Two sessions were held at the appeal stage (the appeal was dismissed). The court reduced the litigation costs claimed for compensation several hundred times over, awarding only RUB 15,000.00.

Clearly, neither economic nor technical arguments can be found to justify this reduction. The argumentation behind this approach can only be explained by political and legal factors, i.e., individuals may not be deprived of access to judicial protection.

Is there a possibility of general jurisdiction courts adopting a different approach — an approach that would be similar to that followed by arbitration judges? It we perceive courts as a social tension release valve, the answer is "no." The accessibility of justice and the representation cost compensation principle do not go well together.

Going back to the subject of this article, we will try to describe what the consistent judicial practice of the two judicial systems will be like after the reform. In deciding the same matter, their courts profess what, in many respects, constitute diametrically opposing principles that have nothing in common. It is hard to believe that there will be an intermediary solution the arithmetic mean of RUB 15,000.00 and USD 1,000,000.00.

The above prompts us to conclude that the difference in approaches adopted by courts of general jurisdiction and state arbitration courts is not a shortcoming but a result

of objective factors. The attempt to find a common denominator will, on the one hand, lead to a murmurings among individual consumers, who will face much more stringent requirements on due care and diligence and, on the other hand, implies that businessmen will continue to flee to freer jurisdictions (for instance, English law for structuring major M&A deals and the LCIA as a dispute resolution forum). And this given that the original intent was quite the opposite, i.e., to raise the profile of the Russian jurisdiction and to de-offshorise the national economy.

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