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INSTITUTIONAL ARBITRATION

TASKS AND POWERS OF DIFFERENT ARBITRATION  
INSTITUTIONS

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**International Arbitration Court  
(IAC) at the Belarusian Chamber of  
Commerce and Industry (BelCCI)**

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## 1. General Topics and Introduction

### 1.1. Background of the Institution and its Arbitration Rules

The International Arbitration Court of the BelCCI<sup>1</sup> (hereinafter—the IAC) is the only permanent arbitration institution operating on the territory of the Republic of Belarus authorised to consider commercial disputes involving both national and foreign parties.

In accordance with article 7 of the Law of the Republic of Belarus "On International Arbitration Court" No 279-3 dated 9 December 1999 (hereinafter—the Law<sup>2</sup>) a permanent international arbitration court may only be established by a non-commercial organisation, the main purpose of which is the promotion of international economic relations with foreign companies and private entrepreneurs.

The IAC was established on 12 April 1994 under the auspices of the Belarusian Chamber of Commerce and Industry (hereinafter—the Chamber) and is duly registered with the Ministry of Justice of the Republic of Belarus under the established procedure. The IAC is a legal entity under Belarusian law and has its Charter that regulates its legal status. The Statute is approved by the Chamber and is not open to the public.

The IAC is located at the following address: Komynisticheskaya str., 11, office 309, 220029, Minsk, Republic of Belarus. Tel./fax: (+375 17) 288-20-76, 288-20-67. E-mail: macbel@fromru.com. The IAC has no official website, but only one webpage on the website of the Chamber, that is at <http://www.cci.by/ArbitrCourt/AboutCourt.aspx>.

The actual version of the Rules of the IAC (hereinafter—the Rules) was adopted by the Presidium of the Chamber on 6 June 2000 and was amended three times: on 2 March 2004, 14 September 2006 and 15 December 2008.

### 1.2. Facts and Figures

There is no official statistic published by the IAC or the Chamber on the performance of the IAC (including caseload, budget and funding or number of employees and staff).

<sup>1</sup> "BelCCI" is the abbreviation for "Belarusian Chamber of Commerce and Industry". Traditionally the full name of the institution was the "International Arbitration Court of the Belarusian Chamber of Commerce and Industry" but after introduction of the special procedure for the use of the word "Belarusian" in the official names the institution started to use the abbreviation.

<sup>2</sup> The Law is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.

According to available unofficial sources the IAC considers roughly 70–80 cases per year during the last three years.

There is no available information on the budget of the IAC but it can be assumed that arbitration fees collected by the institution are the only source of its funding. According to article 49 of the Rules, the arbitration fee covers all expenses related to the IAC activities, including lease payments, equipment, staff remuneration, arbitrators fees, taxes etc.

There are only 5 permanent employees at the IAC: the President of the IAC, the Head of the Information and Consulting Center (hereinafter—the Center), the consultant of the Center, the chief accountant and the driver.

### 1.3. Constitution of the Institution

The governing structure of the IAC is threefold. The Chamber is the supreme authority that approves the Rules, ratifies the Charter and has a decisive role in forming internal bodies: the Presidium of the IAC (hereinafter—the Presidium) and the President of the IAC (hereinafter—the President).

The Presidium presently consists of 6 permanent members. The members of the Presidium are nominated from prominent lawyers, usually scholars, and are appointed by the Chamber. The President is also appointed by the Chamber.

The Center, that is a formal internal subdivision of the IAC, consists of two persons employed by the Court. The Center is directly subordinated to the President.

### 1.4. Specialization of the Institution

There is no particular specialization of the IAC neither in regard to the subject matter of the dispute, nor in relation to geographical coverage.

According to article 2 of the Rules the IAC settles:

- disputes arising between entities in the course of foreign trade and other international economic affairs, if the place of location or residence of at least one of the entities is situated outside of the territory of the Republic of Belarus;
- disputes arising between companies with foreign investments, international associations and organizations set up in the territory of the Republic of Belarus; disputes arising between the members of the above-mentioned legal entities;

- disputes arising between these legal persons and other legal persons and individual entrepreneurs of the Republic of Belarus;
- disputes arising between foreign legal persons and individual entrepreneurs located outside of the Republic of Belarus;
- other disputes of economic nature if the agreement concluded by the parties contains a reference to the IAC for the settlement of a dispute provided that it is not prohibited by legislation of the Republic of Belarus;
- disputes, which fall within its jurisdiction by virtue of the law or international treaty of the Republic of Belarus.

In practice most of the cases referred to the IAC originated from contracts for the international sale of goods and services (transportation, forwarding, construction etc.).

### 1.5. Typical "Users" of the Institution

The vast majority of cases settled by the IAC (about 90% according to available sources) are of international nature. Domestic disputes traditionally form a minor part of the caseload.

Geographically most represented are parties residing in the Russian Federation, Ukraine, Poland, Kazakhstan and Baltic States.

## 2. Main Focus on Specific Issues

### 2.1. Tasks and Responsibilities of the Institution

#### a. Commencement of arbitration

The IAC, and particularly the Center, provides efficient administrative support to the parties at the preparatory stage, in the course of the proceedings and subsequently, after the award is rendered.

It is a usual practice that the parties that are not familiar with arbitration contact the Center before any written claim is filed. Although there is no formal requirement to do so, neither under the Law nor under the Rules, the consultants of the Center provide an interested person with all necessary information and advice on relevant issues: formal requirements for drafting a claim, calculation and payment of arbitration fees, appointment of arbitrators etc.

If it appears that the written claim that was submitted to the IAC does not meet the formal requirements of article 21 of the Rules (content, signature,

Alexey Anischenko

enclosures etc.) the President is obliged by virtue of article 22 of the Rules to invite the claimant to cure all defects within 6 months upon receiving of such invitation. If the claimant fails to do so, then the claim shall be returned to the claimant without commencement of arbitration.

Due to the strict control over international payments in Belarus, complicated currency exchange regulations and national tax law, it is the particular responsibility of the Center altogether with the chief accountant of the IAC to coordinate the collection of the arbitration fees and to ensure that all mandatory rules are observed.

In accordance with article 23 paragraph 1 of the Rules, arbitration commences on the day when the duly executed claim has been filed with the IAC and the arbitration fee was duly paid. According to article 21 paragraph 3 of the Rules, the claim is deemed to be filed from the moment, when the registration fee was duly paid (for detailed information on arbitration costs see section 2.5. *infra*).

In practice, when a party is ready to submit a written claim, it contacts the Center, acknowledges the purported amount of claim and asks the Center to calculate the arbitration fee and produce an official invoice that is necessary to execute the payment.

When the written claim is filed, the fee is paid and the chief accountant of the IAC confirms that the money is credited with the IAC account in Belarusian bank, the President issues the procedural order on commencement of arbitration proceedings. In accordance with article 23 of the Rules such an order is then sent to both parties, while the respondent is also provided by the IAC with a copy of the claim with all enclosures, with the copy of the Rules and with the the List of recommended arbitrators.

b. *Assistance in the course of arbitration proceedings*

The IAC and its permanent staff are involved in the process of the arbitrators' appointment, the challenges and resignations (see section 2.2. *infra*), render procedural assistance (see section 2.3. *infra*) and are also responsible for administrative support to the parties and arbitrators, including provision of the premises for arbitration hearings, forwarding procedural documentation etc.

By general rule, stipulated in article 27 of the Rules (and as happens in most of the real cases), arbitration hearings take place at the premises of the IAC in Minsk and the cost of lease is covered by the arbitration fee. Still the tribunal is free to have a hearing in a different place by its own motion (if necessary) or at the request of the parties subject to separate decision on costs to be incurred.

Article 20 of the Rules imposes an obligation on the IAC to ensure that all correspondence, including claims, counterclaims, notifications, rulings and other procedural documents are timely delivered to the parties or their representatives. The Rules prescribe to use either registered mail with delivery notification or actual personal service for major procedural documents whereas documents of minor importance could be sent via regular mail, telegraph, telefax or any other telecommunication means provided that the text of the message could be fixed. The parties may also ask the IAC to use any particular means of service but at their own cost.

If there is a problem with the determination of the actual address of the recipient, the IAC is required by the Rules to make fair inquiries and only if they fail the IAC may use the last reputed address for service of process.

The President is granted with the right to scrutinize the award after it is being written by the tribunal and before it is handed over to the parties (for more details see section 2.3. *infra*).

c. *Subsequent tasks and responsibilities*

After the award has been rendered, it is very common that the winning party approaches the IAC for assistance in connection with the recognition and enforcement of the award. If this is the case, the IAC, first of all, may provide the interested party with information on the procedure for recognition and enforcement of the award in respective foreign countries (if available) and, secondly, will assist the interested party in the collection and certification of necessary documents (copies of the award, case documents, certificates, reference etc.).

In accordance with article 46 paragraph 1 of the Rules, each case file shall be kept with the IAC's archive for 15 years.

It should also be noted, that if the award was not executed, the creditor may request the Presidium to notify this fact to any business partner of the debtor, chamber of commerce or any other commercial organisation both in Belarus and abroad or even publish such a notification in mass-media at the expense of the creditor. Article 45 of the Rules provides, however, that prior to such a notification a copy of the creditor's request shall be sent to the debtor. Subsequently, a notifications could only be made after one month upon delivery of a copy of the creditor's request to the debtor.

Alexey Anischenko

## 2.2. Establishment of the Arbitral Tribunal

### a. *Choice and number of arbitrators*

Most of the tasks and responsibilities of the IAC related to the establishment of the arbitral tribunal are entrusted to the President.

Thus, under article 6 of the Rules, the President shall appoint the sole arbitrator (as well as the reserve sole arbitrator), if the parties failed to agree on appropriate candidates within 30 days. The President also has the appointing authority if the parties fail to appoint their arbitrators (article 7 of the Rules), if the party-appointed arbitrators fail to agree on the chairman of the arbitral tribunal within 10 days (article 8 of the Rules) and if the parties entrusted the formation of the tribunal to the IAC (article 7 of the Rules).

### b. *Challenges and replacement of arbitrators*

According to article 9 of the Rules, if an arbitrator is challenged and does not resign voluntarily the decision on the challenge shall be made by the two remaining arbitrators. If they fail to agree, or if there is more than one challenge, or if a sole arbitrator is being challenged, then the decision shall be made by the President. The President is also competent to consider the resignations of arbitrators (article 20 paragraph 4 of the Rules). Until the decision on a challenge or resignation is made, the arbitration proceedings shall be postponed.

If the challenge was upheld or an arbitrator resigned voluntarily, he shall be replaced by the respective reserve arbitrator/chairman (that shall be immediately notified by the President). At the same time the party (or party-appointed arbitrators) are invited to appoint a new reserve arbitrator/chairman within 10 days. If they fail to do so, the President has to appoint a new reserve arbitrator/chairman. If the President initially appointed the arbitrator/chairman, than he shall make a new appointment in case of a successful challenge or resignation (article 9 paragraph 5 of the Rules).

Any party may also request the President to dismiss the arbitrator if he can not perform his functions for legal or practical reasons or for any reason that substantially delays the proceedings.

Finally, if the arbitrator dies, ignores or refuse his function, the President shall pass the authority to the reserve arbitrator.

The decisions of the President on challenges, dismissals or resignations are final and may not be appealed.

The only right that is vested to the Presidium in relation to appointment procedures is the right to temporarily suspend appointments of a particular person as an arbitrator in case he or she delays the settlement of disputes where he or she had already been appointed.

### c. *List of arbitrators*

The IAC maintains a list of recommended arbitrators (hereinafter—the List) that is not closed. Any “capable physical person possessing sufficient professional knowledge and appropriate personal qualities” may serve as a party-appointed arbitrator (article 5 of the Rules). However, only a person from the List may be appointed as a Chairman of the arbitral tribunal or serve as a sole arbitrator.

The procedure for inclusion into the List is rather complicated (especially for Belarusian nationals) and requires several recommendations from existing arbitrators, an interview and a formal decision of the Presidium.

There is a special qualification in the Rules in relation to foreign nationals serving as arbitrators. If a party appoints a foreign national as an arbitrator, than a mandatory advance on costs (in the amount determined by the IAC) shall be made within 10 days from the date of such appointment.

The List in its current version consists of 54 persons from 11 countries.

## 2.3. Power of the Institutions in the Proceeding

The Rules do not provide for any special type of proceedings, like accelerated or expedited proceedings.

There is no special provision in the Rules regarding joinder of the proceedings and/or involvement of third parties. In practice there were, however, cases in which the tribunal (but not the IAC itself) by separate order authorised a participation of third parties as long as all other parties did not object.

Sometimes, the IAC is involved in the decision on jurisdiction, although, in general, the arbitral tribunal decides whether it has jurisdiction or not. Thus, according to article 11 of the Rules, if the arbitral tribunal is not yet established but a party contests the jurisdiction of the arbitral tribunal, then the President shall decide on the question of jurisdiction. If the tribunal or the President decides that the IAC has jurisdiction, then any party may appeal such a decision within 15 days to the Presidium whose ruling shall be final.

According to article 16 paragraph 2 of the Rules, members of the Presidium and permanent employees of the IAC may attend all hearings including closed ones but shall keep all information confidential.

Alexey Anischenko

According to article 38 paragraph 6 of the Rules, the arbitral tribunal may at any point in time during arbitration proceedings request the Presidium to clarify questions of applicable law and established court practice.

In accordance with article 43 paragraph 2 of the Rules, the President may terminate the arbitral proceedings if the arbitral tribunal was not duly formed, was not able to gather or ceased to exist.

Finally, in accordance with article 39 of the Rules, the President must authenticate the signatures of the arbitrators on the award. In practice all the awards are being scrutinised by the President before releasing it to the parties. Under the same article the President is authorised to return the award to the tribunal if he finds formal defects in the award to give the tribunal a possibility to cure such defects. In such a case, the President may not require the tribunal to make changes in the award that may affect the substance of the award.

#### 2.4. Interim Measures

In accordance with the Rules (article 12) all powers in relation to application of interim measures are left with the arbitral tribunal. All possible assistance from the IAC is limited to administrative and technical help.

#### 2.5. Cost Issues

##### a. General information

The rules on arbitration costs incurred in the disputes administered by the IAC are set up in Chapter III of the Rules. Under the Rules all expenses incurred during the arbitration proceeding are divided into two parts:

- Arbitration fee (including registration fee), and
- Costs, related to arbitration proceedings.

The amount of the arbitration fee depends upon three main factors:

- Residence of the parties;
- Nature of the claim;
- Claim amount.

In any case the registration fee, being an integral part of the arbitration fee, is fixed, amounts to EUR150 and is non-refundable.

The costs, related to arbitration proceedings, include travel and other expenses, incurred by arbitrators; payments to witnesses, experts (expert organizations) and specialists; expenses incurred with regards to inspection on the spot,

transportation and storage of material evidences and other expenses of the arbitral tribunal.

All decisions on costs and their allocation between the parties are left to the tribunal. According to article 59 of the Rules, the arbitral tribunal awards the winning party the reimbursement of all arbitral expenses incurred from the party that lost the dispute. If the claim was upheld partially, the expenses are divided between the parties proportionally. Irrespective of the decision on the substance, if the party acted in bad faith it may be obliged to compensate additional expenses of the other party caused by such unfair misconduct. The arbitral tribunal can also refuse reimbursement of costs related to arbitral proceedings, if it decides that they were unreasonable or excessive.

After the award is rendered, the arbitral tribunal produces a report to the parties and to the IAC on receiving and spending of the advances and subsequently the IAC pays back unexpended advances to the parties.

VAT shall be levied in accordance with Belarusian tax legislation on all payments due to the IAC.

##### b. Arbitration fee in international disputes

When any of the parties has its place of residence outside Belarus, then the following scale provided in article 50 paragraph 1 of the Rules shall be applicable:

Claim Amount (in Euro)	Arbitration Fee (in Euro)
Up to 5,000	700
5,001-10,000	700 + 5.5% of amount over 5,000
10,001-25,000	975 + 5.5% of amount over 10,000
25,001-50,000	1,800 + 5% of amount over 25,000
50,001-75,000	3,050 + 4.5% of amount over 50,000
75,001-100,000	4,175 + 4% of amount over 75,000
100,001-150,000	5,075 + 3.5% of amount over 100,000
150,001-200,000	6,825 + 3% of amount over 150,000
200,001-500,000	7,825 + 1.5% of amount over 200,000
500,001-1,000,000	12,325 + 1% of amount over 500,000
1,000,001-2,000,000	17,325 + 0.5% of amount over 1,000,000
Over 2,000,000	22,325 + 0.4% of amount over 2,000,000

If the dispute is of non-monetary nature and the claim does not have a specific value, the amount of the arbitration fee shall be determined by the President, however, in all cases shall not be less than 700 Euro.

Alexey Anischenko

c. *Arbitration fee in domestic disputes*

In disputes between Belarusian parties, the arbitration fee shall be determined on a different scale provided in article 50 paragraph 2 of the Rules:

Claim Amount (in Belarusian rubles <sup>3</sup> )	Arbitration Fee (in Belarusian rubles)
Up to 1,000 basic units (BU <sup>4</sup> )	5% of the claim amount but not less than 50 BUs
1,000–10,000 BUs	5% of 1 000 BUs + 3% of amount over 1,000 BUs
Over 10,000 BUs	Amount of arbitration fee due for claim amount equivalent to 10,000 BUs + 1% of claim amount over 10,000 BUs

The amount of arbitration fee for domestic non-monetary disputes is 50 BUs.

d. *Special provisions*

As a general rule the arbitration proceedings may only be commenced upon the receipt of the arbitration fee by the IAC (see section 2.1. *supra*). However, the claimant may apply to the President for the permission to initiate the arbitration proceedings after payment of not less than 50% of the arbitration fee. If such permission is granted, the rest of the arbitration fee shall be paid before the first hearing takes place (article 54 of the Rules).

According to article 52 of the Rules, the amount of the arbitration fee calculated under the procedure above (see subsections b. and c. *supra*) shall be decreased for 30% if the dispute is settled by a sole arbitrator, provided that in all cases the arbitration fee shall be not less than 700 Euro.

If the arbitration proceedings were terminated after the full payment of the arbitration fee, the following amounts (except for registration fee) shall be refunded to the claimant upon the order of the President:

- 75% of the paid amount of the arbitration fee, if the arbitration is terminated before the establishment of the tribunal has taken place;
- 50% of the paid amount of the arbitration fee, if the arbitration is terminated after the establishment of the tribunal but before the first arbitration hearing has taken place.

<sup>3</sup> As of 5 July 2009 the official exchange rate between Euro and Belarusian ruble was 1 to 3,983,24.

<sup>4</sup> As of 5 July 2009 1 BU was equivalent to 35,000 Belarusian rubles.

e. *Determination of the Arbitrators Fees*

The Arbitrators fees are paid out of the amount of the arbitration fee as it is stipulated by article 19 of the Rules. However the procedure of the determination of the arbitrators fees is stipulated by an internal document of the IAC (Regulation approved by the Presidium) which is not open to the public and is being kept strictly confidential by the IAC. All settlements with arbitrators as to their fees are administered by the IAC (the parties do not directly pay the arbitrators) and the decisive role is vested to the President.

2.6. *Timing Issues in Practice*

In accordance with article 14 of the Rules, the arbitral tribunal has to deal with the dispute and to render the award within not more than 6 months from the time of the formation of the tribunal. However, the President may grant an extension of time upon a motivated application of a sole arbitrator or a chairman of the arbitral tribunal.

There is no particular provision in the Rules that provides a precise term for the IAC to hand over a case to the tribunal but in practice it does not take more than a week.

In practice, the IAC endeavors to ensure observation of the 6 months time-limit for settlement of the dispute by the arbitrators, but not always successfully. It is seldom that the IAC is able to deliver an award earlier, however, if a case is complicated the award is rendered and released to the parties often in more than one year from the commencement of arbitration.

The scrutiny of the award by the President could be one of the reasons for possible delays but the IAC affirms that usually it takes no more than one week for the President to accomplish the scrutiny procedure and certify the award as stipulated in article 39 of the Rules.

2.7. *Known Problems of the Institutions or its Representatives*

First and foremost, timing is the main issue that is usually raised by arbitration practitioners and especially local legal counsels when discussing the IAC performance. It is especially relevant in comparison with performance of state commercial courts in Belarus, which are bound by the law to render the judgement within 1.5 months under a very limited number of exceptions. This is believed to be the main reason why the IAC is rarely chosen by the local parties for settlement of domestic disputes.

Secondly, due to small number of arbitration professionals on one side and complicated procedures for entry on to the List the impartiality and indepen-



dence of arbitrators sitting on the same panel may, sometimes, be put into question. The practice that the President (being also the Chairman of the Presidium) actively serves as a sole arbitrator and chairman of the tribunal is controversial as in such cases the same person simultaneously performs adjudicatory and institutional functions.

Thirdly, the IAC, is sometimes criticised for its lack of impartiality when Belarusian state-owned or state-supported companies take part in the arbitration proceedings.

Fourthly, it could be argued that the obligation of the arbitral tribunal to undertake necessary efforts on all stages of arbitration proceedings to stimulate amicable settlements is in fact outside the arbitrator's mandate. In practice some arbitrators often act like mediators and thereby could substantially influence the position of a party to the arbitration.

### 2.8. Chances and Criticism of the Institution

Considering the growth potential of the institution it shall be first stated that the IAC is very weak in marketing and promoting its activity.

On one hand, the relative unpopularity of arbitration as an effective tool for settlement of commercial disputes originates from the historical soviet legal background. On the other hand, the IAC does little to change the situation and to promote itself on an either national or international scale, even taking into account potential lack of sufficient financial resources due to comparatively low arbitration fees and absence of outside investments. There is no effective website of the IAC, there is only limited information on the IAC abroad, especially in foreign languages; until recently the IAC was not active enough in conducting seminars and conferences to promote itself and arbitration in general among the Belarusian and the foreign legal and business community. The IAC has also been criticised for lack of transparency that does not build up confidence in the institution among its existing and prospective users.

Now it is believed that the IAC may well develop and increase its adjudicatory role on both a national and international scale.

On the national level the key driver could be the overload of the state commercial courts and the extreme need to develop alternative dispute resolution methods. It is expected that a new law on arbitration may be introduced to facilitate arbitration of domestic disputes. In addition, there is a growing interest in arbitration among the public and practicing lawyers in particular. It was a very progressive step (although sometimes criticised for disregard

of confidentiality) for the IAC to start publication of its awards, in particular through a major provider of legal databases.

On an international scale, the great potential is seen in the possibility to promote the IAC for the settlement of middle and small-sized disputes between eastern and western businesses. Such factors as improving infrastructure (airport, hotels, translation services) that is now comparable to Russia, Ukraine and even the Baltic States; lower arbitration costs; modern arbitration law and participation of Belarus in major international arbitration conventions, shall contribute to promotion of the IAC as a good venue for settlement of international commercial disputes.

### 3. Brief Summary

The International Arbitration Court of the BelCCI is the only permanent arbitration institution in Belarus that is authorised to settle international and domestic commercial disputes. The institution was established in 1994, the actual version of its arbitration rules was adopted in 2000 and last time revised in 2008. The rules provide for active institutional support of the parties and arbitrators in the course of arbitration. With only five permanent employees the IAC considers 70-80 cases per year.

The IAC could be criticised for its lack of transparency and, sometimes impartiality and slowness. Still, it is believed that the institution may well develop and increase its adjudicatory role on both a national and international scale due to a great potential in promotion of ADR in Belarus, an arbitration friendly legal environment and the development of business infrastructure.

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Alexey Anischenko is a partner and head of dispute resolution practice at Vlasova Mikhel and Partners Law Firm. His key areas of expertise include arbitration and litigation, M&A and corporate, foreign trade and investments, banking and finance. Recent representative cases include international trade, insurance, oil and gas, tax and customs disputes as well as major M&A deals in telecom and banking sectors in Belarus. Alexey has particular experience in representing clients in corporate and bankruptcy cases.

Aside from his practice, Alexey is a Senior Lecturer at the Faculty of International Relations of Belarusian State University where he teaches European Commercial Law and the Law of the World Trade Organization.

Alexey graduated *cum laude* from Belarusian State University, Faculty of Law in 2001. In 2004 he took a postgraduate course in International Trade and Business Law, covering the law of the European Union, the law of the World Trade Organization and international commercial arbitration, at the TMC Asser Institute in the Hague under their eminent Asser College Europe program. He also undertook an internship at the Institute of Legal Sciences of the Polish Academy of Science and a training course for CIS lawyers with the Arbitration Institute of the Stockholm Chamber of Commerce.

Alexey is admitted to practice in Belarus by the Ministry of Justice of the Republic of Belarus. He speaks Belarusian, Russian, English and Polish.

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