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PANDEMIC AS A FACTOR OF E-JUSTICE DEVELOPMENT IN
ARBITRATION COURTS

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Abstract

The creation of platforms for the administration of justice in the context of the COVID-19 pandemic is accelerating and requires urgent solutions to emerging problems. The process of legalization of e-Justice is launched in Russia and is now on the way of expanding to ensure a wider use of various means of communication in trials and introduce digital platforms that use distributed ledger technology and artificial intelligence. The article analyzes the characteristics of online hearings as an element of e-justice, identifies advantages and problematic aspects of their use. The authors study the differences between the new format of online litigation and the ordinary way of participating in remote litigation: videoconferencing that is quite established in legal practice. The study examines issues of legal policy on the new way of trial participation, considers the restrictive measures relating to the spread of COVID-19 in the Russian Federation. The article analyzes the risks associated with the administration of justice online regarding the necessity of respecting the principles of the judicial process, such as the accessibility of justice, adversary principle, the secrecy of the judges' hearing, the guarantee of confidentiality of personal information. The authors propose a series of organizational, technical and procedural measures purposed to ensure effective use of online participation. A conclusion that it is necessary to develop special approaches and long-term targeted preventive measures is drawn on the basis of foreign experience of the functioning of judicial authorities during a pandemic.

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1. Introduction

At the beginning of the 21st century, electronic justice systems were actively introduced into the judicial process in Russia, and there is still ongoing debate on the issue of their necessity. It should be noted that the introduction of information technology ensures the availability of justice. In the Russian Federation, due to low state fees, rather prompt consideration of cases in arbitration courts and the availability of efficiently operating online services, one can affirm a high level of accessibility of courts. Today one can observe such elements of e-justice as: a) submission of documents in electronic form; b) notification by the court of the participants in the process using digital technologies, posting judicial acts in electronic form; c) approving the status of proper evidence for electronic documents; d) organization of electronic document circulation in courts (automated procedure for the distribution of cases, electronic case base); e) posting of information on court activities on the Internet (mandatory publication of judicial acts, posting audio and video recordings of trials, keeping information posted on the online sites of courts up to date, etc.); f) fixing the course of the trial by means of audio and video recordings; g) the opportunity for the parties to remotely participate in court proceedings through video conference calls. The leaders in the use of progressive means, including the Internet are arbitration courts that administer economic justice.

At the same time, until now, the idea of remote hearings has been implemented only fragmentarily through video-conferencing systems, provided for in art. 153.1 of the Arbitration Procedure Code of the Russian Federation (Arbitration Procedure Code of the Russian Federation, 2020), the appeal to which is possible only with the assistance of an arbitration court located in another subject. The conditions of the pandemic required the introduction of several serious restrictions in substantive relations, and also significantly changed the court system, that is, they also affected procedural legal relations (Sourdin & Zeleznikow, 2020). The difficulties that have arisen associated with the suspension of the consideration of certain categories of cases by the courts, the impossibility of personal participation of citizens in the proceedings, etc., have shown the urgent need to develop online mechanisms of procedural communication (Popotas, 2020).

2. Problem Statement

The judicial branch had to solve the problems of organizing the activities of courts and carrying out legal proceedings in connection with the spread of COVID-19 infection. The basis for such changes in the activities of arbitration courts was the Resolution of the Presidium of the Supreme Court of the Russian Federation, the Presidium of the Council of Judges of the Russian Federation № 808 dated March 18, 2020 (The Resolution № 808, 2020) in accordance with which the personal reception of citizens in the courts (from March 19 to April 10, 2020) was temporarily limited in connection with the threat of the spread of a new COVID-19 infection on the territory of the Russian Federation. During this period, only some categories of cases were subject to consideration, for example, those related to preventive measures, with the protection of the interests of minors and the incapacitated, in the event of the refusal of the legal representative from medical intervention necessary to save life, that is, cases that cannot be delayed. However, this list has not been exhaustive. The Resolution gave the courts the right, at their discretion, to classify a case as urgent. The Resolution № 821 of the Presidium of the Supreme Court of the Russian Federation and the Presidium of the Council of Judges, adopted later on April 8, 2020 (The Resolution №

821, 2020), as well as Resolution № 808, suspended the personal reception of citizens, limited the categories of cases under consideration, however, somewhat expanding the list. It also included cases of gross disciplinary offenses when disciplinary arrest was to be considered and on the execution of disciplinary arrest, on securing a claim and some others. Due to the fact that these Resolutions contained an open list of cases that can be considered by courts during a pandemic, as well as the absence of clear and uniform instructions for all courts to change the procedure for their work, during the period of the Resolutions there was no uniform approach to the consideration of cases by the courts. For example, some arbitration courts considered cases of administrative offenses and cases in which the parties filed requests for consideration in their absence, as it was declared on the courts' online sites. The consideration of such cases was not expressly provided for by the aforementioned Resolutions. In addition to suspending the consideration of certain categories of cases and limiting the personal reception of citizens, the Supreme Court of the Russian Federation gave a positive assessment to the holding of hearings using online conference, that is, two-way video communication between two or more users via the Internet, when a participant joins the broadcast of the arbitration court without the help of other arbitration court at the place of its location.

The issue of using an online conference during court hearings is legally regulated only within the framework of the Resolutions. The free use of the online conferencing system by courts during a pandemic does not fully meet legal requirements. Indeed, not a single procedural code, including the Arbitration Procedure Code of the Russian Federation, provides for the possibility of participating in an online proceeding from any place (place of residence, work, etc.). Resolutions cannot replace procedural norms and such recommendations can be considered as beyond competence. Thus, there is an urgent need to give a legitimate form to the practice of online proceedings, developed during the pandemic, by resolving the legislative difficulties that have arisen in such practice.

3. Research Questions

At first it might seem that online conferencing is no different from video conferencing. Just like video conferencing, an online conference technically enables remote exchange of audio and video information in real time, ensures the right of a party to participate in a trial. At the same time, despite the apparent similarities between related technologies - video conferencing and online conferencing are rather different. The main difference between these technologies is the guaranteed (speedy) transmission of audio and video data, as well as the security of the communication channels through which such data is transmitted. Today, many questions arise regarding legal and technical conditions of online conference service use. For example, how can the use of such form of proceedings affect both the quality of the trial in general and a comprehensive study of the circumstances of the case in particular? What are the procedural risks for judicial acts that result these proceedings?

The following questions were the central subject of the study:

- lack of proper legal regulation of this form of proceedings;
- the influence of online proceedings on the accessibility of justice and the adversarial nature of the parties in the arbitration process;
- risks associated with compliance with the need of ensuring procedural conditions of proceedings.

4. Purpose of the Study

The purpose of the study is to determine the place of a new digital service (online conference) in the electronic legal system and to outline the possible risks of using this technology in the arbitration process. The author proves that the designated risks appear to be significant, and therefore require prompt legislative reaction compliant with basic procedural principles (legality, publicity and immediacy, adversariality and proper proof in the process). It is necessary to analyze the procedural clarifications both adopted and proposed for adoption, a brief review of foreign experience in civil proceedings in a pandemic) and consideration of certain aspects of the digitalization of justice. It should also be argued that the potential for using online conferencing system in the arbitration process is much higher than reducing public health risks during a pandemic. The studied digital technology is utterly important for the participation in legal proceedings of persons with disabilities, etc., which will ultimately contribute to the fullest realization of the rights to judicial protection of the general population. In addition, using online conference will save time while waiting for the start of the hearing, which is important for an entrepreneur. All this speaks of the vitality of the institute and the need for its further development and improvement.

5. Research Methods

The main method of scientific knowledge of exceptions is dialectical materialism. This choice can be explained by the inextricable relationship of the objective and the subjective in the categories of dialectics. In matters of studying modern forms of administration of justice, a synergistic method seems to be important, which is a unique direction of influence on cognitive and scientific activity, the ideas of openness, nonlinearity, the possibility of using chaotic (crisis, non-equilibrium) processes for the purpose of self-organization of systems of various nature. Synergetics in jurisprudence acts as a method, realizing its ideas in the study of the principles of the formation and development of the legal system. The modeling method allows the creation of an ideal model of legal regulation of public relations, namely, in terms of building a model of proper legal regulation of forms of administration of justice in the context of digitalization, relevant to criteria such as “due”, “possible”, “desirable”. In matters of research into the influence of modern information technologies on the jurisdictional process, the method of comparative jurisprudence is extremely useful. Its application allows to borrow the most successful and promising experience of foreign legal regulation in order to reform the domestic legal policy.

6. Findings

During a pandemic, in addition to suspending the consideration of certain categories of cases and limiting the personal reception of citizens, the Supreme Court of the Russian Federation gave a positive assessment to the holding of hearings using online conference, that is, two-way video communication between two or more users via the Internet, when a participant joins the broadcast of the arbitration court without assistance from another arbitration court at the place of its location. It must be distinguished from video conferencing, organized by two or more arbitration courts through a letter of assignment. Online conference makes it convenient to connect subscribers from external organizations or remote users, that is, participants in the process, to a video conference. That is, when using online videoconferencing, the

participant in the proceedings must arrive where there is equipment for such communication, for example, to another arbitration court, with online conference there is no such need.

Conducting court hearings online has significant advantages:

- accessibility (parties and participants in the process, regardless of their location and movement restrictions, can participate in the hearing);
- minimization of financial and time costs (for moving to another subject, waiting for a hearing, etc.);
- reducing the number of persons participating in the hearing in person (especially in a difficult epidemiological situation).

Moreover, online hearings differ significantly from the videoconferencing system due to:

- more flexibility of the procedure;
- the possibility of holding an online conference without the assistance of another arbitration court located in the respective region, and regardless of time arrangements;
- procedural savings due to the absence of the need for a number of procedural actions;
- the absence of such organizational difficulties as the time difference between the subjects of the Russian Federation and the schedule of videoconferencing sessions established by the courts (some of them conduct such sessions once or twice a week).

The Supreme Court of the Russian Federation emphasized the need for judges, if possible, to initiate hearings in an online format. The urgent need for this is reflected in the fact that during restrictive measures it was not allowed to let anyone except proceedings participants into the court buildings, and judges and employees of the court apparatus were obliged to take measures of self-isolation at the slightest sign of illness. In such conditions, the issue of observance of procedural deadlines during the period of self-isolation of the population due to the impossibility of postponing the hearing in order to comply with these deadlines, for example, when it was impossible to attend a judge or an employee of the judicial apparatus in person, as well as to prevent morbidity in general, arose sharply. Thus, in the context of a pandemic, a situation arose in arbitration courts that dictated the need for the earliest possible introduction of information technologies, the Internet in the vast majority of procedural actions. However, the level of readiness of courts to use them, as well as the compliance of these technologies with high requirements for confidentiality and personal identification is still in question. Many authors assess online conference system negatively pointing out that use of Internet connection is provided through unprotected communication channels. The opposite position is expressed by the Supreme Court of the Russian Federation thus that not only the necessary requirements for the security of the channels used in the online conference system have been met, but also the procedure for personal identification has been regulated. To hold a hearing online any proceedings participant must undergo identification and authentication through the portal of public services after sending all the necessary documents to the court. After that, their identity and powers are checked by the court, and then they are allowed to participate in the hearing. If the application is satisfied, the participant gets a link to connect to the hearing online by e-mail and through his personal account. After that, one needs to log in to the government services portal and connect to the online conference system.

To recall the above, recommendations on the use of online conference in litigation were given in clause 5 of the Resolution № 821 of the Presidium of the Supreme Court of the Russian Federation and the

Presidium of the Council of Judges of the Russian Federation on April 8, 2020. Moreover, in addition to the recommendation, any regulatory acts regulating the procedure for using the service in litigation (the procedure for hearing applications for holding online sessions, holding a hearing using this technology) were not accepted. At present, the existence of this form of holding hearings is outside the legal field, which, of course, requires the adoption of appropriate regulation.

It should be noted that the problem related to the lack of legal regulation of online conference use is the issue of determining the status of explanations of persons participating in an online hearing as evidence. In particular, part 2 of Art. 64 of the Arbitration Procedure Code of the Russian Federation classifies the explanations of the persons participating in the case and other participants in the arbitration process, obtained through the use of video-conferencing systems, as evidence in the case. In the absence of special legal regulation, it seems reasonable to be guided by the general principles of the arbitration process and the analogy of law. So, since the institution of video-conferencing is close to online conference, then with regard to applications for online sessions, the procedure for filing and resolving applications established for video-conferencing should be adhered to rules on video-conferencing (Article 159 of the Arbitration Procedure Code of the Russian Federation).

In accordance with paragraph 4 of art. 159 of the Arbitration Procedure Code of the Russian Federation, a claim for participation in a hearing by using video-conference communication systems is submitted to the court considering the case, before the case is scheduled for trial and is considered by the judge of the case alone within five days after the day the claim was received by the arbitration court without notice of parties. One can statement motion for video-conferencing in a claim or a response to a statement of claim. According to paragraph 5 of Art. 159 of the Arbitration Procedure Code of the Russian Federation, the arbitration court has the right to refuse to satisfy the application or petition if they were not filed in a timely manner by the person participating in the case due to abuse of his procedural rights and if clearly aimed at disrupting the hearing, delaying the trial, obstructing the consideration of the case and the adoption of the legal and a substantiated judicial act, unless the applicant was unable to submit such a claim or such a motion earlier for objective reasons. An analysis of law enforcement practice shows that the use of analogy in regard of video conferencing when resolving motions for holding online hearings is actively used by arbitration courts. The next problem is that the development of electronic online justice increases its accessibility for some but decreases for others. So, according to the global report of the digital market Digital 2020, up to 20% of the population of Russia do not have access to the Internet, which entails digital inequality of the participants in the process. In addition, the openness and publicity of legal proceedings is ensured, among other things, by the possibility of the presence in an open session of persons who are not participants in the process (for example, representatives of the media). However, under existing conditions, the possibility of the courts' compliance with these principles is questioned.

There are risks directly related to compliance with the procedural conditions for the administration of justice. According to Art. 63 of the Arbitration Procedure Code of the Russian Federation, the arbitration court is obliged to check the powers of the persons participating in the case and their representatives, to decide the issue of allowing them to participate in the proceedings on the basis of a study of the documents presented in the hearing.

You do not need a qualified electronic signature to participate in the hearing. It is enough to log in through the “Gosuslugi” service. As a result, the court can only identify a person who is registered on this service and whose documents (electronic images of a power of attorney, passport, diploma) were sent to participate in the online conference, but there is no possibility of actual identification of the person (clause 2 of p. 2 of art. 153, p. 3 of art. 153.1 of the Arbitration Procedure Code of the Russian Federation), identity proof is not presented to the court. In this regard, the risk of submission of falsified identity and powers of the representative documents increases, since the court is deprived of the opportunity to establish their authenticity by reviewing the original; technical problems in organizing online communication may also be an obstacle. In fact, the court is limited in deciding the issue of the possibility of participation of persons in the hearing, establishing the identity of the participants in the process and checking their powers. If there is any doubt, it is not clear whether the court should postpone the trial or can hold the hearing without the participation of the person who is denied admission, whether the refusal of admission is grounds for considering the case in the absence of the person who did not appear on the basis of art. 156 Arbitration Procedure Code of the Russian Federation. The problem of online litigation lies in providing and disclosing evidence. First, this affects the principle of immediacy in the arbitration process. Of course, all participants in online conferences could actively participate in the discussion and demonstrate various materials, submit electronic documents. However, material evidence cannot be presented for inspection using online hearing, which is a significant drawback of this method of conducting a trial. In online hearings there is objectively no opportunity to ensure the confidentiality of the hearing, which allows the party to manipulate this circumstance in the subsequent appeal of the judicial act adopted using the online conference system. The introduction and active use of online conference is not limited to the listed risks. The identified risks seem to be significant, therefore require their prompt legislative regulation, while observing the basic procedural principles (legality, publicity and immediacy, adversariality and proper proof in the process). We believe that the use of online conferencing system should not be widespread, it can only take place in cases where the parties do not have other opportunities that are provided by procedural legislation (for example, in a situation with the administration of justice in a pandemic).

However, Russia is not the only country looking to solve such problems. Foreign countries are also facing the challenges of the new reality for the first time. On March 27, 2020, the first online hearing was held in Britain: the appellate court heard the first complaint against conviction, when all involved appeared remotely from different places. The world's legal response to the COVID-19 has proven that necessity is indeed the mother of invention. The outbreak caused more than half of the courts and tribunals in England and Wales to close along the suspension of new jury trials. To track some cases, hearings in the Magistrates' Courts, the High Court, the Court of Appeal and the Supreme Court were conducted completely remotely, with judges, lawyers, witnesses, translators and journalists making phone calls and video calls. Videoconferencing is conducted by UK courts via Skype for Business on HMCTS. At the same time, the participants in the process do not need any special equipment, except a telephone and additional equipment such as headphones, speakers, etc. According to the Instruction, on the day of the case hearing, all participants must be in a quiet place where they cannot be overheard. The hearing is recorded and stored.

In the US, video conferencing has so far been only used in California, Texas and New York. Judicial system is less centralized there, so issues of this kind are the responsibility of the state office (Denault &

Patterson, 2020). On March 28, 2020, the California state government endorsed interim directives to introduce a remote justice system in the region. Courts are now using video conferencing and telephony for remote speaking, court reports and interpretation during proceedings. Remote justice is used in criminal cases and cases involving minors (indictment and preliminary hearings). And that happens despite the fact that before the outbreak of the epidemic the use of video conferencing in California was prohibited. In Texas, remote justice system is targeting the Zoom platform and YouTube streaming to remotely conduct court hearings and broadcast them live on the Internet.

The experience of China shows that legal proceedings via the Internet become natural and justified when the disputed legal relations developed or proceeded in digital environment. This is due to the speed of development of such relations, often at the low cost of the dispute itself and the lack of motivation of the participants in the process to spend time and effort on complex procedures. All these circumstances seem to indicate the atomization of justice, that is, the creation of such Internet resources through which all the main procedural actions are carried out, legalized by the state in law. This trend allows to achieve accessibility, openness and transparency of justice, as well as to significantly speed up and simplify the work of the courts, strengthening confidence in the judiciary system.

7. Conclusion

Despite arising procedural (identification of participants in a Skype or WhatsApp conference, ensuring proper order in an online hearing, securing the confidentiality of the courtroom, etc.) and technical (unauthorized access, quality of communication, technical problems in equipment, the possibility of reviewing with the content of documents submitted by the other party, etc.) issues, the very idea of interaction between the court and the participants in the proceedings using modern forms of communication is highly supported (Rozhnov, 2020). However, what is supported in a pandemic in normal life requires detailed elaboration and broad discussion. As an alternative to video conferencing, it is worth considering the inclusion of open video conferencing modules into existing systems (SAS Justice, My Arbitrator) - digital presences that provide external connection from any place convenient for the participant in the process, and not just from the nearest court.

After all, all possible procedural, technical, and even ethical issues do not seem insoluble in this case. The same identification of persons participating in remote litigation may well be carried out within the framework of the Unified Identification and Authentication System. It seems that further development of this institution shall accelerate development of personality identification technologies. An important tool in the development of online conference system in the arbitration process is introduction of biometric authentication technologies, allowing authentication by voice and face. It seems that this is how the Supreme Court of the Russian Federation assesses the further adaptation of judicial procedures in the conditions of the pandemic. Anyhow, since April 29, courts were recommended to hold hearings using a video-conferencing system and (or) an online conference relating the experience of the Supreme Court of the Russian Federation. Now, the only available description of the algorithm for conducting court hearings online is information on the online site of the Supreme Court of the Russian Federation. The recognition of online proceedings as an adequate tool for conducting court hearings opens up opportunities for the courts and participants in the process to use alternative platforms for online hearings.

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